N. 2877

No. 13840

United States
Court of Appeals
for the Ninth Circuit

CAPITOL CHEVROLET COMPANY, a corporation, Appellant,

vs.

LAWRENCE WAREHOUSE COMPANY, a corporation, Appellee.

JAMES A. KENYON, ADAMS SERVICE CO., a corporation, F. NORMAN PHELPS and ALICE PHELPS, Appellants,

vs.

LAWRENCE WAREHOUSE COMPANY, a corporation, Appellee.

Transcript of Record

Appeals from the United States District Court for the Northern District of California, Southern Division

Phillips & Van Orden Co., 870 Brannan Street, San Francisco, Calif.

No. 13840

United States
Court of Appeals
for the Ninth Circuit

CAPITOL CHEVROLET COMPANY, a corporation, Appellant,

vs.

LAWRENCE WAREHOUSE COMPANY, a corporation, Appellee.

JAMES A. KENYON, ADAMS SERVICE CO., a corporation, F. NORMAN PHELPS and ALICE PHELPS, Appellants,

vs.

LAWRENCE WAREHOUSE COMPANY, a corporation, Appellee.

Transcript of Record

Appeals from the United States District Court for the Northern District of California, Southern Division

Philips & Van Orden Co., 870 Brannan Street, San Francisco, Calif.

INDEX

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

NAMES AND ADDRESSES OF ATTORNEYS

HERBERT W. CLARK, Esq.,
RICHARD J. ARCHER, Esq.,
MORRISON, HOHFELD, FOERSTER,
SHUMAN & CLARK,

11th Floor Crocker Building,
San Francisco 4, California,

JAMES B. ISAACS, Esq.,
DEMPSEY, THAYER, DEIBERT & KUMLER,

1104 Pacific Mutual Building,
Los Angeles 14, California,

For Appellants.

W. R. WALLACE, Jr., Esq.,
MAYNARD GARRISON, Esq.,
JOHN R. PASCOE, Esq.,
WALLACE, GARRISON, NORTON & RAY,

2200 Shell Building,
San Francisco 4, California,

For Appellee.

In the United States District Court for the Northern District of California, Southern Division

No. 23171-G

DEFENSE SUPPLIES CORPORATION,
Plaintiff,

vs.

LAWRENCE WAREHOUSE COMPANY, a corporation, CAPITOL CHEVROLET COMPANY, a corporation, CLYDE W. HENRY, CONSTANTINE PARELLA, V. J. McGREW, CHARLES ELMORE, FIRST DOE COMPANY, a corporation, SECOND DOE COMPANY, a corporation, FIRST DOE and SECOND DOE, Defendants.

DOCKET ENTRIES

1944

Feb. 16—Filed complt. Issued summons.

Mar. 20—Filed ans. of C. Parella.
Warehouse Co.

Apr. 14—Filed Ans of Capitol Chevrolet Co. and x complt.

Apr. 18—Filed ans of C. W. Henry.

Apr. 18—Filed ans of C. Elmore.

Apr. 29—Filed ans of cross-deft Parella to cross-complt.

May 8—Filed aff'dt of service by mail and ans of Lawrence Warehouse Co.

May 12—Filed ans to interrogs propounded to pltff by deft Lawrence Warehouse.

1944

May 17—Filed answer of Cross-deft C. Parella to Cross-Claim of Lawrence Warehouse Co.

May 18—Filed ans of Capitol Chevrolet Co. to cross-complt of Lawrence Warehouse Co.

May 19—Filed ans of x-deft Clyde W. Henry to x-complt of Lawrence Warehouse Co.

May 19—Filed ans of x-deft C. W. Henry to x-complt of Capitol Chevrolet Co.

Nov. 24—Filed no of time and place of trial.

1946

Feb. 20—Ord findgs prepared etc in main case; fur ord hrg on x complts dropped from cal to be restored on mo interested parties.

Apr. 15—Filed Judgt for Pltf $41,975.15 plus costs etc.

June 14—Filed notice of appeal. Mailed No. 6/20.

1949

June 17—Filed mandate of U. S. court of appeals dismissing appeals in this cause.

1951

Mar. 7—Filed substitution of Dempsey, Thayer, Deibert & Kumler as counsel for Capitol Chevrolet Co.

1952

Mar. 3—Filed first amended answer of Capitol Chev. Company to x-claim.

Mar. 4—Filed ord. consolidating with 30473 for trial March 5, 1952 (Goodman).

1952

Mar. 5—Filed motion of Cap. Chev. Company to dism. cross-claim of Lawrence.

Apr. 11—Filed notice by Cap. Chev. Company of motion to strike evidence, April 12, 1952 at 10 a.m.

Sept. 12—Filed ord. for judgment vs. Capitol Chevrolet Company for $68019.15 and costs; vs. James A. Kenyon and Adams Service Co. for said amount in No. 30473; case 30473 dismissed as to Capitol Chevrolet Co. and J.A.K. Co.; Case 30473 vs. Cap. Chev. Company dism. and as to F. Norman Phelps and Alice Phelps dba Adams Service Co. Findings, conclusions and Judgment to be presented (Goodman).

Nov. 21—Filed notice by cross-claimant Lawrence and motion to vacate submission and reopen case for further hearing, Dec. 3, 1952 (In 30473).

Dec. 9—Filed notice and motion by cross-claimant to modify opinion and order for judgment, Dec. 16, 1952, before Judge Goodman.

1953

Jan. 15—Filed ord amending order for judgment. (In case 30473 judgment for $68,019.15 should be against F. Norman Phelps and Alice Phelps as well as James A. Kenyon and Adams Service Co.) Counsel to submit amended findings, conclusions and judgment (Goodman).

1953

Feb. 11—Filed final judgment that Lawrence Warehouse Company recover from Capitol Chevrolet Company on cross-claim $68,294.15 with $7,975.58 interest to date (total $76,269.73); Lawrence Warehouse Company recover from James A. Kenyon, Adams Service Co., F. Norman Phelps and Alice Phelps $68,294.15 with $7,975.58 interest to date (total $76,269.73) and costs in 30473-Civ.; that cross-claims of Lawrence Warehouse Company vs. Capitol Chevrolet Company, Capitol Chevrolet Co., and J.A.K. Co. in case 30473 are dismissed and Capitol Chevrolet Company, Capitol Chevrolet Co., and J.A.K. Co. recover costs vs. Lawrence Warehouse Company. (Goodman).

[Title of District Court and Cause No. 23171.]

NOTICE OF TIME AND PLACE OF TRIAL

To Defendant Lawrence Warehouse Company, a Corporation, and to Messrs. Williamson & Wallace, its Attorneys; to Defendant Capitol Chevrolet Company, a Corporation, and to A. J. Getz, Esq., & Cameron B. Aikens, Esq., its Attorneys; to Defendants Clyde W. Henry and Charles Elmore and to Louis J. Glicksberg, Esq., their Attorney; to Defendant Constantine Parella and to Evan J. Hughes, Esq., his Attorney; to Defendant V. J. McGrew and to Albert H. Gommo, Jr., Esq., his Attorney.

You, and each of you, will please take notice hereby given that the above cause has been set for trial in the courtroom of Judge Louis E. Goodman, judge of the above-entitled court, in the Post Office Building, Seventh and Mission Streets, San Francisco, California, for the 13th day of February, 1945, at the hour of 10:00 o'clock a.m.

Dated: November 20, 1944.

/s/ THEODORE R. MEYER,
/s/ BROBECK, PHLEGER & HARRISON,
Attorneys for Plaintiff.

Affidavit of Service by Mail attached.

[Endorsed]: Filed Nov. 24, 1944.

[Title of District Court and Cause No. 23171.]

MANDATE

United States of America—ss.

The President of the United States of America.

To the Honorable, the Judges of the United States District Court for the Northern District of California, Southern Division, Greeting:

Whereas, lately in the United States District Court for the Northern District of California, Southern Division, before you or some of you, in a cause between Defense Supplies Corporation, plaintiff, and Lawrence Warehouse Company, a corporation, Capitol Chevrolet Company, a corporation, Clyde W. Henry, et al., defendants, No. 23171-G, a Judgment was duly filed and entered on the 15th day of April, 1946, which said Judgment is of record and fully set out in said cause in the office of the clerk of the said District Court, to which record reference is hereby made, and the same is hereby expressly made a part hereof,

And Whereas, the said Lawrence Warehouse Company, Capitol Chevrolet Company, V. J. McGrew, and Defense Supplies Corporation appealed to this court as by the inspection of the transcript of the record of the said District Court, which was brought into the United States Court of Appeals for the Ninth Circuit by virtue of an appeal agreeably to the Act of Congress, in such cases made and provided, fully and at large appears.

And Whereas, on the 16th day of June, in the year of our Lord, one thousand nine hundred and forty-nine, the said cause came on to be heard before the said United States Court of Appeals for the Ninth Circuit, on the said transcript of record, and on the mandate of the Supreme Court of the United States herein, and was duly submitted:

On Consideration Whereof, It is now here ordered and adjudged by this Court that the appeals in this cause be, and hereby are dismissed, with costs in favor of Defense Supplies Corporation and Reconstruction Finance Corporation, and against Lawrence Warehouse Co., Capitol Chevrolet Co., and V. J. McGrew.

You, Therefore, Are Hereby Commanded that such proceedings be had in said cause, in conformity with the judgment of this court, as according to right and justice, and the laws of the United States, ought to be had, the said appeal notwithstanding.

Witness the Honorable Fred. M. Vinson, Chief Justice of the United States, the sixteenth day of June in the year of our Lord one thousand nine hundred and forty-nine.

[Seal] /s/ PAUL P. O'BRIEN,
Clerk, United States Court of Appeals for the Ninth Circuit.

Costs: To Defense Supplies Corp. and Reconstruction Finance Corp. for certiorari: $114.66.

[Endorsed]: Filed June 17, 1949.

In the United States District Court for the Northern District of California, Southern Division

No. 23171-G

DEFENSE SUPPLIES CORPORATION,
Plaintiff,

vs.

LAWRENCE WAREHOUSE COMPANY, et al.,
Defendants.

LAWRENCE WAREHOUSE COMPANY, a corporation, Cross-Claimant,

vs.

CLYDE W. HENRY, CONSTANTINE PARELLA and CAPITOL CHEVROLET COMPANY, a corporation,
Cross-Defendants.

FIRST AMENDED ANSWER OF CAPITOL CHEVROLET COMPANY TO CROSS-CLAIM

Comes now cross-defendant Capitol Chevrolet Company, a corporation, and answers the cross-claim of Lawrence Warehouse Company, a corporation, on file herein as follows:

As and for a First Defense to the cross-claim of Lawrence Warehouse Company, a corporation, on file herein, cross-defendant Capitol Chevrolet Company avers as follows:

I.

The evidence and pleadings, including the complaint, cross-claim, answers to complaint and an-

swers to cross-claims, have been merged in the judgment rendered by the above-styled Court in the above-entitled action on April 15, 1946.

II.

The evidence and pleadings, including the complaint, cross-claims, answers to complaint and answers to cross-claims, have been merged in the findings of fact and conclusions of law rendered by the above-styled Court in the above-entitled action on April 15, 1946.

As and for a Second Defense to the cross-claim of Lawrence Warehouse Company, a corporation, on file herein, cross-defendant Capitol Chevrolet Company admits, denies and avers as follows:

I.

Answering paragraph I, said cross-defendant admits the averments of the first sentence of said paragraph. Said cross-defendant avers that in making the lease referred to in said paragraph cross-defendant Capitol Chevrolet Company acted under the authority and direction of plaintiff and Lawrence Warehouse Company, and only after plaintiff and Lawrence Warehouse Company had inspected and approved the said premises and the fire protection facilities therein and available thereto and approved the same for the storage therein of tires and tubes belonging to plaintiff. Except as in this answering paragraph admitted, said cross-defendant denies the averments of paragraph I.

II.

Answering paragraph II, said cross-defendant avers that if cross-defendants Clyde W. Henry and Constantine Parella by and through their agents, servants and employees, or any other persons, entered into said premises, or any part thereof, at or about the time therein alleged, that said entry was made under and by virtue of the terms of a certain lease made and executed on or about the first day of March, 1943, which provided, among other things, that said cross-defendants Clyde W. Henry and Constantine Parella reserved unto themselves the right to enter upon said premises and to make repairs or alterations therein, and that said provision of said lease was known, consented to, approved, authorized, accepted and assumed by cross-claimant Lawrence Warehouse Company, a corporation, and the plaintiff, Defense Supplies Corporation. Said cross-defendant further avers that said entry was permitted, directed and authorized by cross-claimant Lawrence Warehouse Company. Except as in this answering paragraph admitted, said cross-defendant denies the averments of said paragraph.

III.

Answering paragraph III, said cross-defendant avers that it agreed to and did provide space and storage under the direction and authorization of cross-claimant Lawrence Warehouse Company for certain tires and tubes received from Lawrence Warehouse Company and Defense Supplies Corporation, and that any hazards from fire were known,

consented to, accepted and assumed by Lawrence Warehouse Company and Defense Supplies Corporation. Said cross-defendant further avers that it agreed only to indemnify Lawrence Warehouse Company against loss or damage resulting from a failure on the part of Capitol Chevrolet Company to perform any of its duties under said agency agreement. Except as in this answering paragraph admitted, said cross-defendant denies the averments of paragraph III.

IV.

Answering paragraph IV, said cross-defendant admits that certain tires and tubes were wholly consumed by fire at or about the time and place therein alleged. Except as in this answering paragraph admitted, said cross-defendant denies the averments of said paragraph.

V.

Answering paragraph V, said cross-defendant states that it is without knowledge or information sufficient to form a belief as to the truth of the averments in said paragraph.

As and for a Third Defense to the cross-claim of Lawrence Warehouse Company, a corporation, on file herein, said cross-defendant avers as follows:

I.

Said cross-defendant avers that at all times mentioned in said cross-claim, Lawrence Warehouse Company and the plaintiff, and each of them, retained and maintained an agent, servant and employee in the capacity of a guard or watchman in

and about the premises described in the cross-claim, and that at all times herein mentioned said guard or watchman was acting within the course and scope of his said agency and employment.

II.

Said cross-defendant avers that at the time and place of the fire described in said cross-claim, said Lawrence Warehouse Company did not itself exercise ordinary care, caution or prudence in the premises to avoid said fire, and that the damages resulting therefrom to plaintiff and cross-claimant, if any there were, were proximately contributed to and caused by the negligence and failure to act of said agent, servant and employee of Lawrence Warehouse Company and plaintiff in that said agent, servant and employee failed to exercise ordinary care, caution and prudence to avoid said fire at the time and place of the happening of said fire and negligently watched, guarded and observed said premises and the activities of the person or persons in or about said premises so as to cause the said fire to commence and to continue unabated thus causing the damage and the whole thereof, if any there were.

As and for a Fourth Defense to the cross-claim of Lawrence Warehouse Company, a corporation, on file herein, said cross-defendant avers as follows:

I.

At the time and place of the fire described in the said cross-claim, and prior thereto, Lawrence Ware-

house Company knew, consented to, accepted and did assume all the risks and hazards of said fire.

As and for a Fifth Defense to the cross-claim of Lawrence Warehouse Company, a corporation, on file herein, said cross-defendant avers as follows:

I.

All the acts of Capitol Chevrolet Company set forth in the complaint and in said cross-claim in the above-entitled action were pursuant to the agreement described in paragraph III of said cross-claim and were directed and authorized by Lawrence Warehouse Company.

As and for a Sixth Defense to the cross-claim of Lawrence Warehouse Company, a corporation, on file herein, said cross-defendant avers as follows:

I.

At no time mentioned in said cross-claim did Capitol Chevrolet Company have any dominion or control over the defendants Clyde W. Henry, Constantine Parella, V. J. McGrew and Charles Elmore, or any of the persons or corporations sued herein under fictitious names, and none of said defendants was employed by or a servant or agent of, or authorized to act for said cross-defendant.

II.

The entry of said defendants Clyde W. Henry, Constantine Parella, V. J. McGrew and Charles Elmore, and each of them, in, near or upon the

premises described in said cross-claim was under, pursuant and subject to the terms and provisions of that certain lease described in paragraph I of said cross-claim. Said cross-defendant further avers that in the making of said lease Capitol Chevrolet Company acted under the authorization, direction and instructions of Lawrence Warehouse Company, and only after Defense Supplies Corporation and Lawrence Warehouse Company, and each of them, had inspected and approved said premises and the fire protection facilities therein and available thereto and all the terms and provisions of said lease. Said cross-defendant further avers that said entry was authorized and permitted by Lawrence Warehouse Company.

As and for a Seventh Defense to the cross-claim of Lawrence Warehouse Company, a corporation, on file herein, said cross-defendant avers as follows:

I.

In the above-entitled action it has been ordered, adjudged and decreed that Defense Supplies Corporation, the plaintiff herein, have and recover from defendants herein Lawrence Warehouse Company, a corporation, and cross-claimant herein, Capitol Chevrolet Company, a corporation, and one of the cross-defendants herein, and V. J. McGrew, jointly and severally, the sum of Forty-one Thousand Nine Hundred Seventy-five and 15/100 Dollars ($41,975.15), together with plaintiff's costs and disbursements in said action.

II.

In the above-entitled action the court has found and concluded that said Lawrence Warehouse Company failed and omitted to exercise reasonable care and diligence for the protection and preservation of goods of plaintiff herein, and that the negligence of defendants in said action, V. J. McGrew, Lawrence Warehouse Company and Capitol Chevrolet Company concurred and joined together.

As and for an Eighth Defense to the cross-claim of Lawrence Warehouse Company, a corporation, on file herein, said cross-defendant avers as follows:

I.

Cross-claimant Lawrence Warehouse Company was equally, jointly and contributorily negligent, or negligent in any of said ways with cross-defendant Capitol Chevrolet Company in causing the damage for which judgment has been rendered in the above-entitled action, if said Capitol Chevrolet Company were negligent at all or if any negligence of said Capitol Chevrolet Company caused or contributed to the cause of said damage.

II.

Cross-claimant Lawrence Warehouse Company had knowledge of, acquiesced in, directed, authorized and consented to any negligence, if any there were, of said Capitol Chevrolet Company, which caused or contributed to the cause of the damage for which judgment was rendered in the above-entitled action.

Wherefore, cross-defendant Capitol Chevrolet Company prays that cross-claimant Lawrence Warehouse Company take nothing by this action and that said cross-defendant be awarded its costs of suit herein incurred.

Dated: San Francisco, February 29, 1952.

/s/ JAMES B. ISAACS,
/s/ DEMPSEY, THAYER, DEIBERT & KUMLER,
/s/ HERBERT W. CLARK,
/s/ RICHARD J. ARCHER,
/s/ MORRISON, HOHFELD, FOERSTER, SHUMAN & CLARK.
Attorneys for Cross-Defendant Capitol Chevrolet Company.

[Endorsed]: Filed March 3, 1952.

[Title of District Court and Causes 23171-30473.]

ORDER FOR CONSOLIDATION

Pursuant to Rule 42 (a) of Federal Rules of Civil Procedure, and in confirmation of minute order heretofore made and entered on January 9, 1952, it is hereby Ordered that the above-captioned actions be consolidated for trial on March 5, 1952.

Dated: March 4th, 1952.

/s/ LOUIS E. GOODMAN,
Judge of the United States District Court.

[Endorsed]: Filed March 4, 1952.

[Title of District Court and Cause No. 23171.]

NOTICE OF MOTION BY CAPITOL CHEVROLET COMPANY TO STRIKE EVIDENCE

To: Lawrence Warehouse Company, a corporation, and W. R. Wallace, Jr., Esq., John R. Pascoe, Esq., and Messrs. Wallace, Garrison, Norton & Ray, its attorneys:

Please take notice that cross-defendant Capitol Chevrolet Company will move the above-styled Court in the courtroom of the Honorable Louis E. Goodman, United States Post-Office and Court House Building, San Francisco, California, on April 21, 1952, at 10:00 a.m. or as soon thereafter as counsel can be heard, for its order striking the following evidence offered by cross-claimant Lawrence Warehouse Company and admitted by the Court over objection of cross-defendant Capitol Chevrolet Company at the trial of the cross-claims of said cross-claimant in the above-entitled action on March 6, 1952:

The transcript of the evidence adduced at the trial of the complaint of Defense Supplies Corporation in the above-entitled action, including the transcript of testimony and exhibits (Tr. of Trials of Cross-Claims, p. 12, lines 3 to 18, inclusive).

This motion will be based on the objections made to such evidence at the time it was offered, the right reserved by the Court, and stipulated to by cross-

claimant, to this moving cross-defendant to move to strike the aforesaid evidence, and the attached Memorandum of Points and Authorities.

Dated: San Francisco, April 11, 1952.

/s/ JAMES B. ISAACS,
/s/ DEMPSEY, THAYER, DEIBERT & KUMLER,
/s/ HERBERT W. CLARK,
/s/ RICHARD J. ARCHER,
/s/ MORRISON, HOHFELD, FOERSTER, SHUMAN & CLARK,
Attorneys for Cross-Defendants Capitol Chevrolet Company, et al.

Memorandum of Points and Authorities

I.

The evidence adduced at the trial of the complaint of Defense Supplies Corporation in No. 23171 was limited, insofar as Capitol Chevrolet Company was concerned, solely to the issue of whether Capitol Chevrolet Company failed to perform some duty owed to Defense Supplies Corporation.

A. The Court made a judicial record on and final determination of this issue by its Judgment of April 15, 1946, and its Findings of Fact and Conclusions of Law of April 15, 1946.

II.

The evidence adduced at the trial of the complaint of Defense Supplies Corporation in No. 23171 cannot be utilized to show that Capitol Chevrolet Com-

pany failed to perform some duty it may have owed to Lawrence Warehouse Company.

A. Evidence in a former trial is admissible against a party only if the party had the right to cross examine on the issue in regard to which the evidence is offered.

Industrial Products Mfg. Co. vs. Jewett, 15 Fed. Rules Serv. 43a.3 Case 1 (S.D. Iowa, 1951);

California Code of Civil Procedure, Sec. 1870 (8);

Werner vs. State Bar, 24 Cal. 2d 611 at 616, 150 P. 2d 892 (1944).

III.

The evidence adduced at the trial of the complaint of Defense Supplies Corporation in No. 23171 cannot be introduced on the issue as to which it was originally offered because on that issue the Court has made a final determination.

A. A judicial record is the "best evidence" of a judicial determination.

Sills vs. Forbes, 33 C.A. 2d 219 at 229, 91 P. 2d 246 (1939); hearing in Supreme Court denied.

B. The evidence adduced at the trial of the complaint of Lawrence Warehouse Company in No. 23171 is "integrated" in a judicial record.

In re Crosby Stores, 65 F. 2d 360 at 361 (2d Cir. 1933).

C. An unambiguous judicial record cannot be modified by extrinsic evidence.

Moore vs. Harjo, 144 F. 2d 318 at 321, et seq. (10th Cir. 1944);

Rothschild & Co. vs. Marshall, 44 F. 2d 546 at 548 (9th Cir. 1930).

D. A judicial record cannot be contradicted by extrinsic evidence that something different was intended.

In re Crosby Stores, 65 F. 2d 360 at 361 (2d Cir. 1933);

Louisiana Land & Exp. Co. vs. Parish of Jefferson, 59 F. Supp. 260 at 266 (E.D. La. 1945).

E. A party who relies on a judicial record cannot impeach its recitals.

Barnsdall Refining Corporation vs. Birnamwood Oil Co., 32 F. Supp. 308 at 313 (E.D. Wis. 1940).

IV.

The evidence offered at the trial of the complaint of Defense Supplies Corporation in No. 23171 is incompetent and inadmissible hearsay where now offered by Lawrence Warehouse Company on the issues raised by the cross-claims and the answers of the cross-defendant.

A. Under California law to use the transcript of testimony at a former trial it is necessary to establish the unavailability of the witnesses whose testimony appears in the transcript.

California Code of Civil Procedure, Sec. 1870 (8);

Gordon vs. Nichols, 86 C.A. 2d 571 at 576, et seq., 195 P. 2d 464 (1948); petition for hearing by Supreme Court denied.

B. Under Federal Law the transcript of testimony given at a former trial is admissible, if at all, only where the unavailability of the witnesses whose testimony appears in the transcript is established.

Rule 43(a), Federal Rules Civil Procedure;
Salt Lake City vs. Smith, 104 Fed. 457 at 468, et seq. (8th Cir. 1900);
Toledo Traction Co. vs. Cameron, 137 Fed. 48 at 57 et seq. (6th Cir. 1905);
Great Northern Ry. Co. vs. Ennis, 236 Fed. 17 at 25 et seq. (9th Cir. 1916);
United States vs. Aluminum Co. of America, 1 F.R.D. 48 at 50 (S.D. N.Y. 1938);
In re Robinson, 42 F. Supp. 342 at 345 (D. Mass. 1941).

V.

At the trial of the cross-claim of Lawrence Warehouse Company against the cross-defendant Capitol Chevrolet Company the Court reserved to cross-defendant the right to make the foregoing motion to strike evidence and the cross-claimant stipulated to such reservation.

Transcript of Trials of Cross Claims, page 12, lines 3-15; page 17, line 2, to page 18, line 2; page 19, lines 7-16.

[Endorsed]: Filed April 11, 1952.

In the United States District Court for the Northern District of California, Southern Division

No. 23171

[Title of Cause.]

No. 30473

RECONSTRUCTION FINANCE CORPORATION, Plaintiff,

vs.

CAPITOL CHEVROLET COMPANY a corporation, et al., Defendants.

ORDER FOR JUDGMENT

Early in 1943, the Defense Supplies Corporation, an agency of the United States, contracted with Lawrence Warehouse Company, (hereinafter referred to as Lawrence) to store a quantity of automobile tires and tubes. Lawrence in turn contracted with the Capitol Chevrolet Company (hereinafter referred to as Capitol) to warehouse these tires and tubes as its agent. Capitol stored the tires and tubes in a warehouse leased from Clyde W. Henry. On April 9, 1943, the warehouse along with all the tires and tubes, was destroyed by a fire which started while one V. J. McGrew was operating an acetylene torch in the engine room of the warehouse.

On February 16, 1944, Defense Supplies Corporation commenced an action against Lawrence, Capitol, Henry, and McGrew to recover damages for the loss of the tires and tubes. Pursuant to Rule 13, F.R.C.P., on May 8, 1944, Lawrence cross-com-

plained against Capitol and Henry, alleging their liability for any judgment obtained against it. Capitol likewise cross-complained against Henry.

At the trial, it appeared that the defendant Capitol Chevrolet Company, a corporation had been dissolved on June 5, 1944, all of its assets having been distributed on December 31, 1943, to its stockholders James A. Kenyon, and Adams Service Co., a corporation wholly owned by F. Norman Phelps and Alice Phelps. The former stockholders had carried on the business of the Capitol Chevrolet Company as a limited partnership, and had expressly agreed to assume its liabilities. They were not named as defendants, but actively assumed the defense of the action in behalf of the Capitol Chevrolet Company.

At the conclusion of the plaintiff's case, counsel for all the defendants stated that no evidence would be presented in their behalf, and moved to dismiss the action and for judgment in their favor. The cause was submitted upon the motions to dismiss. Counsel for Lawrence, Capitol, and Henry agreed that the trial of the cross-complaints should await the final determination of the plaintiff's cause, a procedure sanctioned by Rule 54(b).

On January 9, 1946, the Court filed an opinion, 67 F. Supp. 16, and order for judgment in favor of plaintiff Defense Supplies Corporation and against Lawrence, Capitol, and McGrew. Henry was found to be free from negligence and liability. The Court stated in its opinion that the fire was caused by McGrew's negligent operation of the acet-

ylene torch, and that Capitol was also negligent in permitting McGrew to enter the premises without ascertaining his intentions and in failing to maintain proper safeguards against fire. The negligence of Capitol, the Court stated, was imputable to its principal Lawrence.

In Findings filed April 14, 1946, the Court found that "defendants Lawrence Warehouse Company and Capitol Chevrolet Company failed and omitted to exercise reasonable care and diligence for the protection and preservation of said goods so deposited and stored by plaintiff in this, that said defendants negligently permitted the use of said torch on said premises and negligently failed and omitted to see that it was used in a careful manner, and to provide adequate protection for said premises and said goods against the use of said torch, and maintained said premises and said goods in a negligent and careless manner so as to permit them to become ignited and destroyed by fire. By reason of such negligence and carelessness said premises and plaintiff's said goods were consumed and totally destroyed by fire." The Court further found that "the negligence of defendants V. J. McGrew, Lawrence Warehouse Company, and Capitol Chevrolet Company concurred and joined together to destroy plaintiff's Goods, as aforesaid," and that "by reason of said negligent acts of defendants V. J. McGrew, Lawrence Warehouse Company, and Capitol Chevrolet Company, plaintiff has been damaged in the sum of $41,975.15." A joint and several judgment against the defendants

Lawrence, Capitol, and McGrew was entered in favor of Defense Supplies Corporation for $41,-975.15 plus costs of $186.55.

This judgment was affirmed on appeal on December 5, 1947, 164 F.2d 773. Subsequently, defendants moved the Court of Appeals to vacate the affirmance and to remand the cause to this court with instructions to dismiss. The ground of the motion was that the Defense Supplies Corporation had been dissolved on June 30, 1945, and, hence, when this Court had entered the judgment on April 14, 1946, it had lost its jurisdiction. This motion was granted by the Court of Appeals, 168 F.2d 199. On certiorari, the Supreme Court held that, while the appeal from the judgment of this court had abated on July 2, 1946, the judgment was valid when entered, and could be sued upon by the successor of the Defense Supplies Corporation, the Reconstruction Finance Corporation, 336 U. S. 631.

On April 12, 1951, Reconstruction Finance Corporation brought suit on the judgment in favor of Defense Supplies Corporation. In that action, No. 30473, Lawrence cross-complained both against the old Capitol Chevrolet Company, which had been dissolved on June 5, 1944, and against its stockholders James A. Kenyon and Adams Service Co., who had, upon its dissolution, acquired its assets, assumed its liabilities, and carried on its business as a limited partnership. Lawrence also cross-complained against a new corporation, Capitol Chevrolet Co., organized April 10, 1946, to succeed the limited partnership, and against certain stockhold-

ers of this corporation, namely, the J. A. K. Co., a corporation, and F. Norman Phelps and Alice Phelps. On November 20, 1951, the Court entered final judgment in favor of Reconstruction Finance Corporation for $42,171.70, plus costs of $20.00 and 7% interest from April 15, 1946, against Capitol, Lawrence and McGrew. This judgment was entered without prejudice to the further prosecution by Lawrence of its cross-claims. Lawrence paid the entire judgment of $58,859.90 on December 1, 1951.

On January 9, 1952, the Court ordered the cross-claims of Lawrence in the original action No. 23171 and in No. 30473 consolidated for trial. At the trial on March 6, 1952, Lawrence rested its case on the evidence previously presented by Defense Supplies Corporation. One witness testified in behalf of the cross-defendants.

In the opinion of the Court, the evidence in the record sustains the conclusion that Capitol is liable to its principal Lawrence for the loss incurred by Lawrence as a result of the negligent acts of Capitol. The liability of Capitol rests both on its breach of duty as an agent and its express agreement "to indemnify the principal against loss or damage resulting from a failure on the part of the Agent to perform any of the duties or obligations" assumed. Among the duties undertaken by Capitol was "to store and safeguard the storage of such tires and tubes" as were received by Capitol. This conclusion is not precluded by the references, in the findings previously made by the Court in this cause, to the negligence of Lawrence. These findings in no way

denoted that the negligence of Lawrence, there referred to, was anything more than negligence imputed to Lawrence as the principal of Capitol.

The contention of Capitol, that the evidence introduced by Defense Supplies Corporation upon the trial of its complaint, cannot be considered in determining the cross-complaint, is without merit, inasmuch as the trial of the cross-complaint is but another phase of the same action. Capitol's contention is not supported by the authorities cited. Nor are any other of the special defenses sustained.

The action, No. 23171, against Capitol, not having abated by Capitol's dissolution, Calif. Corporation Code §5401, judgment may enter against the Capitol Chevrolet Company for $68,019.15, plus the court costs of prosecuting the cross-complaint.

James A. Kenyon and Adams Service Co. having actively participated in the defense of Capitol Chevrolet Company in No. 23171, the judgment in that action is res judicata as to them. Inasmuch as they assumed the liabilities of Capitol Chevrolet Company upon its dissolution, they are liable for the amount of the judgment against Capitol. Judgment may therefore go in No. 30473 against James A. Kenyon and Adams Service Co. for $68,-019.15, plus the court costs of prosecuting the cross-complaint.

There is no evidence that the Capitol Chevrolet Co., which succeeded the limited partnership, assumed any of the liabilities of the old Capitol Chevrolet Company, or of the partnership or its members. The cause of action in No. 30473 against the

Capitol Chevrolet Co. is therefore dismissed. The J. A. K. Co., being merely a stockholder of the Capitol Chevrolet Co., the action against it, is also dismissed.

The Capitol Chevrolet Company having been long since dissolved when the cross-complaint in No. 30473 was filed, that action against it is dismissed. The evidence is inconclusive as to whether F. Norman Phelps and Alice Phelps might be treated as the alter ego of the Adams Service Co. The action against them is therefore dismissed.

Present Findings pursuant to the Rules.

Dated: September 8th, 1952.

/s/ LOUIS E. GOODMAN,
United States District Judge.

[Endorsed]: Filed Sept. 12, 1952.

[Title of District Court and Causes 23171-30473.]

ORDER AMENDING ORDER FOR JUDGMENT

On September 12, 1952, the court filed herein its order for judgment. On page 6, in the last paragraph thereof, the court stated: "The evidence is inconclusive as to whether F. Norman Phelps and Alice Phelps might be treated as the alter ego of the Adams Service Co. The action against them is therefore dismissed." Subsequently, cross complainant Lawrence Warehouse Company moved the court for an order vacating the submission of the

case and to reopen the same for further hearing upon the question of the liability of the defendants F. Norman Phelps and Alice Phelps. This motion has been argued and submitted to the court. As well, proposed findings of fact and conclusions of law and proposed amendments thereto have been submitted by the parties.

Upon further consideration, the court is of the opinion that, in action 30473, judgment for $68,-019.15 should go against the defendants F. Norman Phelps and Alice Phelps as well as against the defendants James A. Keynon and Adams Service Co.

In the opening brief upon submission of the cause, cross complainant Lawrence Warehouse Co. contended that judgment should go against the two Phelps as well as against the Adams Service Co. on the ground that the Phelps were the alter ego of the Adams Service Co. In the reply brief filed on behalf of all the cross defendants, counsel stated on page 23 thereof, after arguing against the liability of the Adams Service Co.: "It is not contended that F. Norman Phelps and Alice Phelps are not liable if Adams Service Company is liable." In the reply memorandum of cross complainant Lawrence Warehouse Co. no further mention was made of this subject.

Upon re-examination of the depositions of F. Norman Phelps and Alice Phelps, the interrogatories and answers thereto, and the record and files in the case, it now appears to the court that no issue was ever raised by defendants as to any

distinction in liability as between Adams Service Co. and the two Phelps. The reason for this is obvious. The evidence shows that Adams Service Co., while clothed in the formal habiliments of a corporation, actually never functioned as such. It is reasonably inferable from the testimony of Phelps that the Adams Service Co. was a mere formality designed to benefit the Phelps taxwise. When the assets of the Adams Service Co. were transferred to the new Capitol Chevrolet Company, stock of the latter company given in payment thereof, was issued directly to the two Phelps. It thus appears that the two Phelps actually dealt with the property of the Adams Service Co. as if it were their own in every respect. As to the Phelps' liability, it is evident from the record that they themselves and their counsel never made any distinction as between the Adams Service Co. and the Phelps in the event of any court decree determining liability on the part of the Adams Service Co. In this posture of the record, it would be manifestly unjust, since the court has decided that Adams Service Co. is liable, if the judgment did not as well run against the two Phelps individually.

It is ordered that counsel submit amended findings of fact and conclusions of law accordingly.

Dated: January 15, 1953.

/s/ LOUIS E. GOODMAN,
United States District Judge.

[Endorsed]: Filed Jan. 15, 1953.

[Title of District Court and Cause No. 23171.]

NOTICE OF APPEAL TO COURT OF APPEALS UNDER RULE 73(b)

Notice is hereby given that Capitol Chevrolet Company, named above as a cross-defendant, hereby appeals to the United States Court of Appeals for the Ninth Circuit from the judgment in this action dated February 11, 1953, and entered on February 12, 1953.

Dated: San Francisco, March 10, 1953.

/s/ HERBERT W. CLARK
/s/ RICHARD J. ARCHER
/s/ MORRISON, HOHFELD, FOERSTER, SHUMAN & CLARK

/s/ JAMES B. ISAACS
/s/ DEMPSEY, THAYER, DEIBERT & KUMLER
Attorneys for Appellant, Capitol Chevrolet Company.

[Endorsed]: Filed March 10, 1953.

[Title of District Court and Cause No. 23171.]

DESIGNATION BY CAPITOL CHEVROLET COMPANY OF PORTIONS OF RECORD, PROCEEDINGS AND EVIDENCE TO BE CONTAINED IN RECORD ON APPEAL

To: The Clerk of the United States District Court for the Northern District of California, Southern Division:

Pursuant to Rule 75(a) of the Federal Rules of Civil Procedure, appellant designates the following portions of the record to be contained in the record on appeal in the above-entitled action to the United States Court of Appeals for the Ninth Circuit:

1. The complete record and all the proceedings and evidence (including all the exhibits) in the action, including but not limited to the following:

(a) The complaint of Defense Supplies Corporation;

(b) Answer of defendant Capitol Chevrolet Company and cross-claim against certain defendants;

(c) Answer of defendant Lawrence Warehouse Company and cross-claim against certain defendants;

(d) Answer of Capitol Chevrolet Company to cross-complaint of Lawrence Warehouse Company;

(e) Answer of cross-defendant Constantine Parella to cross-complaint of Lawrence Warehouse Company;

(f) Answer of cross-defendant Constantine Parella to cross-complaint of Capitol Chevrolet Company;

(g) Answer of cross-defendant Clyde W. Henry to cross-complaint of Lawrence Warehouse Company;

(h) Answer of cross-defendant Clyde W. Henry to cross-complaint of Lawrence Warehouse Company;

(i) The minute order dated February 20, 1946 (Civil Minutes Vol. 56);

(j) Findings of fact and conclusions of law dated April 15, 1946;

(k) Judgment dated April 15, 1946;

(l) The mandate of the Court of Appeals;

(m) First amended answer of Capitol Chevrolet Company to cross-claim;

(n) Notice of motion by Capitol Chevrolet Company to strike evidence, filed April 11, 1952;

(o) Findings of fact and conclusions of law dated February 11, 1953;

(p) Judgment dated February 11, 1953;

(q) The transcript of testimony, appearances and all the evidence and exhibits introduced at the trial which commenced on February 13, 1945, and ended February 15, 1945;

(r) The order for consolidation filed March 4, 1952;

(s) The transcript of testimony, appearances and all the evidence and exhibits introduced at the trial on March 5, 1952;

(t) The motion to set for trial and the notice of trial for the trial which commenced on February 13, 1945, and ended February 15, 1945;

(u) All the docket entries in the above-entitled action;

(v) The notice of appeal filed by Capitol Chevrolet Company;

(w) This designation of portions of record, proceedings and evidence.

Dated: San Francisco, March 12, 1953.

/s/ HERBERT W. CLARK,
/s/ RICHARD J. ARCHER,
/s/ MORRISON, HOHFELD, FOERSTER, SHUMAN & CLARK,

/s/ JAMES B. ISAACS,
/s/ DEMPSEY, THAYER, DEIBERT & KUMLER,
Attorneys for Appellant Capitol Chevrolet Company.

Acknowledgment of Service attached.

[Endorsed]: Filed March 12, 1953.

[Title of District Court and Cause No. 30473.]

DOCKET ENTRIES

1951

Apr. 12—Filed complaint-issued 2 summons. (1 No. Dist. Calif.—1 So. Dist. Calif.)

May 5—Filed answer of Capitol Chevrolet Co.

May 28—Filed answer of James A. Kenyon.

June 15—Filed answer and cross claim of Seaboard Surety Co.

1951

June 27—Filed answer of Lawrence Warehouse Co. to cross-claim of Seaboard Surety Co.

June 29—Filed answer of Capitol Chev. Company.

July 17—Filed answer of cross deft. Capitol Chev. Company.

July 17—Filed answer of cross deft. James A. Kenyon.

Nov. 20—Filed judgment for plaintiffs vs. Lawrence Warehouse Co., Seaboard Surety Company, V. J. McGrew and Capitol Chevrolet Company, jointly and severally, in sum $42,171.70 with 7% interest from April 15, 1946, and costs. Execution to issue after Dec. 1, 1951. (Goodman).

Nov. 21—Entered judgment. Mailed notices.

Dec. 7 — Filed notice by Lawrence Warehouse Company of Payment of judgment and claim to contribution or repayment.

Dec. 7—Filed assignment of judgment by Reconstruction Finance Co. to Lawrence Warehouse Co.

[Title of District Court and Cause No. 30473.]

COMPLAINT ON JUDGMENT

Plaintiff complains of defendants and each of them and for cause of action alleges:

I.

This is a civil action; the amount in controversy exceeds $3,000 exclusive of interest and costs; the jurisdiction of this Court is conferred by reason of the amount in controversy and as arising under a law of the United States, the Government of the United States being the owner and holder of more than one-half of the capitol stock of the plaintiff, Reconstruction Finance Corporation.

II.

At all times herein mentioned plaintiff was and now is a federal corporation created by and organized under an Act of Congress of the United States, to wit: "Reconstruction Finance Corporation Act" (Act of January 22, 1932, Chapter VIII, 47 Statutes at Large, page 5, Title 15 U.S.C.A., para. 601-607, inclusive), as amended and supplemented, and derives its existence, faculties and powers therefrom and that all of its capital stock and assets are wholly owned by the Government of the United States of America; that said Reconstruction Finance Corporation is an agency, arm and instrumentality of the United States of America for carrying out the purposes and objects of its incorporation by the Congress, and has been

at all times since its creation engaged solely in carrying out such purposes and objects and has the power to contract and be contracted with, sue and be sued in its corporate name as such, to acquire property and property rights and to exercise ownership of and to protect the property and property rights so acquired and hereinafter referred to as well as to enforce the rights vested in it and by virtue of such law of the United States and more particularly the rights hereinafter set forth.

III.

Defendant Lawrence Warehouse Company is now and at all times herein mentioned has been a corporation duly organized and existing under and by virtue of the laws of the State of California, having its principal place of business in the City and County of San Francisco, State of California.

IV.

Defendant Capitol Chevrolet Company at all times mentioned herein and until on or about June 5, 1944 was a corporation duly organized and existing under and by virtue of the laws of the State of California, having its principal place of business in the City of Sacramento, County of Sacramento, State of California.

V.

Defendant Capitol Chevrolet Co. is now and ever since on or about the 10th day of April, 1946, has been a corporation duly organized and existing un-

der and by virtue of the laws of the State of California, having its principal place of business in the City of Sacramento, County of Sacramento, State of California.

VI.

Defendant Seaboard Surety Company, a corporation, is now and at all times mentioned herein has been a corporation duly organized and existing under and by virtue of the laws of the State of New York and authorized to transact and doing a general surety business in the State of California and having a place of business in the City and County of San Francisco, State of California.

VII.

On or about April 15, 1946, in the above-entitled District Court of the United States of America, Northern District of California, Southern Division, a judgment was duly given, rendered and made by said court in favor of Defense Supplies Corporation, the plaintiff, and against the above-named defendants, Lawrence Warehouse Company, a corporation, Capitol Chevrolet Company, a corporation, and V. J. McGrew, and each of them, in an action filed on February 16, 1944, and then pending in said court and numbered 23171-G in the Records of said court, wherein said Defense Supplies Corporation was plaintiff and said Lawrence Warehouse Company, Capitol Chevrolet Company and V. J. McGrew were defendants for the principal sum of $41,975.15, together with costs in the sum of $196.55, said sums aggregating the

total sum of $42,171.70 and which said last mentioned sum bears interest from the date of said judgment until paid at the rate of seven per cent per annum.

VIII.

On or about June 12, 1946, the defendant Seaboard Surety Company made its undertaking on appeal (Bond No. RSF-422) in said action for the principal sum of $45,000 in favor of Defense Supplies Corporation; said undertaking on appeal was filed on June 14, 1946, in said action on behalf of defendant Lawrence Warehouse Company; said undertaking provided that if the said Lawrence Warehouse Company, as appellant in said action, failed to pay the amount of such judgment as might be affirmed against the said appellant, within 30 days after the filing of the remittitur from the Appellate Court, then judgment could be entered in said action on the motion of Defense Supplies Corporation, as respondent, without notice to the surety in favor of Defense Supplies Corporation and against the surety for the amount of such judgment, together with interest and the damages and costs awarded against the said appellant upon appeal.

IX.

On or about June 16, 1949, judgment was entered by the United States Court of Appeals in said action dismissing the appeals which had been taken therein by the defendants Capitol Chevrolet Company, a corporation, and Lawrence Warehouse Company, a corporation, and said judgment in said

action in favor of Defense Supplies Corporation thereupon became final.

X.

Nothing has been paid on account of the principal or interest on said judgment and there now remains due, owing and unpaid on said judgment the principal sum of $42,171.70, together with interest thereon at seven per cent per annum from April 15, 1946 until paid.

XI.

By joint resolution of the Congress of the United States on June 30, 1945 (c. 215, Public Law 109, 59 Statutes 310) all functions, powers, duties and authority of said Defense Supplies Corporation were transferred, together with all of its documents, books of account, records, assets and liabilities of every kind and nature, to plaintiff Reconstruction Finance Corporation.

XII.

Plaintiff Reconstruction Finance Corporation is now the owner of said judgment and of all rights of Defense Supplies Corporation thereunder and is entitled to bring this action thereon by reason of said joint resolution of the Congress and by reason of the decision of the Supreme Court of the United States on April 18, 1949 (336 U.S. 631, 93 Law. Ed. 931, rehearing denied May 31, 1949) on certiorari to the United States Court of Appeals for the Ninth Circuit in the said case in which said judgment was made and entered.

XIII.

Plaintiff is informed and believes and therefore alleges that on or about June 5, 1944, the defendant corporation Capitol Chevrolet Company was dissolved and all of its assets and properties transferred to the defendant James A. Kenyon and that said defendant James A. Kenyon in consideration of the transfer to him of the properties and assets of the said corporation assumed and agreed to pay all of the liabilities of said corporation, including the liability of said defendant corporation to Defense Supplies Corporation; that thereafter and on or about April 10, 1946, said defendant James A. Kenyon caused to be incorporated the defendant corporation Capitol Chevrolet Co. and transferred to said defendant Capitol Chevrolet Co. all or part of the properties and assets which defendant James A. Kenyon had received upon dissolution of Capitol Chevrolet Company, and that said defendant Capitol Chevrolet Co. received and accepted the transfer of the property and assets from the defendant James A. Kenyon and then and there and in consideration thereof assumed and agreed to pay the liabilities of said defendant Capitol Chevrolet Company and the liabilities of said defendant James A. Kenyon, including the liability of said defendant Capitol Chevrolet Company and defendant James A. Kenyon to Defense Supplies Corporation.

XIV.

Said judgment has not been vacated, set aside or reversed, the appeals taken therefrom have been

dismissed, motions for a new trial have been denied, and said judgment is in all respects final and is now in full force and effect.

Wherefore, plaintiff Reconstruction Finance Corporation prays judgment against said defendants Capitol Chevrolet Company, a corporation, Lawrence Warehouse Company, a corporation, James A. Kenyon, Capitol Chevrolet Co., a corporation, V. J. McGrew, and Seaboard Surety Company, a corporation, and each of them, as follows:

1. For the principal sum of $42,171.70, together with interest thereon from April 15, 1946 until paid at the rate of seven per cent per annum.

2. For its costs of suit herein incurred.

3. For such other and further relief as is meet and proper in the premises.

/s/ R. L. MILLER,
/s/ BROBECK, PHLEGER & HARRISON,
Attorneys for Plaintiff.

[Endorsed]: Filed April 12, 1951.

[Title of District Court and Cause No. 30473.]

ANSWER OF DEFENDANT CAPITOL CHEVROLET CO., A CORPORATION

For answer to the complaint of the plaintiff in the above-entitled cause, defendant Capitol Chevrolet Co. says:

I.

Answering paragraph I of the complaint, defendant admits the allegations therein contained.

II.

Answering paragraph II of the complaint, defendant admits the allegations therein contained.

III.

Answering paragraph III of the complaint, defendant admits the allegations therein contained.

IV.

Answering paragraph IV of the complaint, defendant denies the allegations therein contained.

V.

Answering paragraph V of the complaint, defendant admits the allegations therein contained.

VI.

Answering paragraph VI of the complaint, defendant denies that it has any knowledge or information sufficient to form a belief as to the allegations therein contained and therefore denies the allegation of said paragraph.

VII.

Answering paragraph VII of the complaint, defendant admits the allegations therein contained.

VIII.

Answering paragraph VIII of the complaint, defendant admits the allegations therein contained.

IX.

Answering paragraph IX of the complaint, defendant specifically denies each and every allegation therein contained.

X.

Answering paragraph X of the complaint, defendant denies that it has any knowledge or information sufficient to form a belief as to the allegations therein contained and therefore denies the allegations of said paragraph.

XI.

Answering paragraph XI of the complaint, defendant admits the allegations therein contained.

XII.

Answering paragraph XII of the complaint, defendant specifically denies each and every allegation therein contained.

XIII.

Answering paragraph XIII of the complaint, defendant specifically denies each and every allegation therein contained.

XIV.

Answering paragraph XIV of the complaint, defendant admits the allegations therein contained.

XV.

Defendant denies each and every allegation in the complaint not herein admitted, controverted or specifically denied.

First Separate and Distinct Defense.

I.

The complaint fails to state a claim against defendant upon which relief can be granted.

Second Separate and Distinct Defense.

I.

The right of action set forth in the complaint did not accrue within four years next before the commencement of this action and is therefore barred under Section 337 of the Code of Civil Procedure of the State of California.

Third Separate and Distinct Defense.

I.

The right of action set forth in the complaint did not accrue within four years next before the commencement of this action and is therefore barred under Section 343 of the Code of Civil Procedure of the State of California.

Fourth Separate and Distinct Defense.

I.

The right of action set forth in the complaint did not accrue within three years next before the commencement of this action and is therefore

barred under Section 338 of the Code of Civil Procedure of the State of California.

Fifth Separate and Distinct Defense.

I.

The right of action set forth in the complaint did not accrue within three years next before the commencement of this action and is therefore barred under Section 359 of the Code of Civil Procedure of the State of California.

Sixth Separate and Distinct Defense.

I.

That all and every matters stated in the complaint are matters which may be tried and determined at law and with respect to which plaintiff is not entitled to any relief from a court of equity, as it has a complete and adequate remedy at law by judgment against the original parties to the judgment who are jointly and severally liable thereon and execution against said defendants since one or more of them is financially solvent and able to satisfy such judgment.

Seventh Separate and Distinct Defense.

I.

Plaintiff, with full knowledge of all the facts, did not commence any proceedings to recover from defendant until the institution of this suit and defendant therefore says that plaintiff has been guilty of laches.

Wherefore, defendant Capitol Chevrolet Co. prays judgment:

1. That the complaint of the plaintiff be dismissed as to this defendant.

2. That the defendant be granted such other and further relief as to the Court may seem meet and proper.

DEMPSEY, THAYER, DEIBERT & KUMLER and EARL S. PATTERSON

/s/ By H. C. ALPHSON,

Attorneys for Defendant, Capitol Chevrolet Co.

Affidavit of Service by Mail attached.

[Endorsed]: Filed May 5, 1951.

[Title of District Court and Cause No. 30473.]

ANSWER OF DEFENDANT JAMES A. KENYON

For answer to the complaint of the plaintiff in the above-entitled cause, defendant James A. Kenyon says:

I.

Answering paragraph I of the complaint, defendant admits the allegations therein contained.

II.

Answering paragraph II of the complaint, defendant admits the allegations therein contained.

III.

Answering paragraph III of the complaint, defendant admits the allegations therein contained.

IV.

Answering paragraph IV of the complaint, defendant denies the allegations therein contained.

V.

Answering paragraph V of the complaint, defendant admits the allegations therein contained.

VI.

Answering paragraph VI of the complaint, defendant denies that he has any knowledge or information sufficient to form a belief as to the allegations therein contained and therefore denies the allegation of said paragraph.

VII.

Answering paragraph VII of the complaint, defendant admits the allegations therein contained.

VIII.

Answering paragraph VIII of the complaint, defendant admits the allegations therein contained.

IX.

Answering paragraph IX of the complaint, defendant specifically denies each and every allegation therein contained.

X.

Answering paragraph X of the complaint, defendant denies that he has any knowledge or information sufficient to form a belief as to allega-

tions therein contained and therefore denies the allegations of said paragraph.

XI.

Answering paragraph XI of the complaint, defendant admits the allegations therein contained.

XII.

Answering paragraph XII of the complaint, defendant specifically denies each and every allegation therein contained.

XIII.

Answering paragraph XIII of the complaint, defendant specifically denies each and every allegation therein contained.

XIV.

Answering paragraph XIV of the complaint, defendant admits the allegations therein contained.

XV.

Defendant denies each and every allegation in the complaint not herein admitted, controverted or specifically denied.

First Separate and Distinct Defense.

I.

The complaint fails to state a claim against defendant upon which relief can be granted.

Second Separate and Distinct Defense.

I.

The right of action set forth in the complaint did not accrue within four years next before the com-

mencement of this action and is therefore barred under Section 337 of the Code of Civil Procedure of the State of California.

Third Separate and Distinct Defense.

I.

The right of action set forth in the complaint did not accrue within four years next before the commencement of this action and is therefore barred under Section 343 of the Code of Civil Procedure of the State of California.

Fourth Separate and Distinct Defense.

I.

The right of action set forth in the complaint did not accrue within three years next before the commencement of this action and is therefore barred under Section 338 of the Code of Civil Procedure of the State of California.

Fifth Separate and Distinct Defense.

I.

The right of action set forth in the complaint did not accrue within three years next before the commencement of this action and is therefore barred under Section 359 of the Code of Civil Procedure of the State of California.

Sixth Separate and Distinct Defense.

I.

The right of action set forth in the complaint did not accrue within two years next before the com-

mencement of this action and is therefore barred under Section 339 of the Code of Civil Procedure of the State of California.

Seventh Separate and Distinct Defense.

I.

The right of action set forth in the complaint did not accrue within six months next before the commencement of this action and is therefore barred under Section 341 of the Code of Civil Procedure of the State of California.

Eighth Separate and Distinct Defense.

I.

That all and every matters stated in the complaint are matters which may be tried and determined at law and with respect to which plaintiff is not entitled to any relief from a court of equity, as it has a complete and adequate remedy at law by judgment against the original parties to the judgment and execution against said defendants since one or more of them is financially solvent and able to satisfy such judgment or by proceedings supplementary to execution.

Ninth Separate and Distinct Defense.

I.

Plaintiff, with full knowledge of all the facts, did not commence any proceedings to recover from defendant until the institution of this suit and defendant therefore says that plaintiff has been guilty of laches.

Wherefore, defendant James A. Kenyon prays judgment:

1. That the complaint of the plaintiff be dismissed as to this defendant.

2. That the defendant be granted such other and further relief as to the Court may seem meet and proper.

DEMPSEY, THAYER, DEIBERT & KUMLER and EARL S. PATTERSON

/s/ By H. C. ALPHSON,

Attorneys for Defendant James A. Kenyon.

Affidavit of Service by Mail attached.

[Endorsed]: Filed May 28, 1951.

[Title of District Court and Cause No. 30473.]

ANSWER OF DEFENDANT LAWRENCE WAREHOUSE COMPANY AND CROSS-CLAIM AGAINST CERTAIN DEFENDANTS.

Comes now defendant Lawrence Warehouse Company, a corporation, and for answer to the complaint on file herein admits, denies and alleges as follows:

I.

Admits the allegations of paragraphs I to XIV, inclusive.

And by way of a second, separate and further defense defendant alleges:

I.

Repeats and re-alleges the allegations contained in Paragraph I of its Answer as if the same were herein set out in full.

II.

Plaintiff, with full knowledge of all the facts, did not commence any proceedings to recover upon said judgment from June 16, 1949, until the commencement of this action on April 12, 1951, and is, therefore, guilty of laches.

And by way of cross-claim against defendants and cross-defendants Capitol Chevrolet Company, a corporation, James A. Kenyon, Capitol Chevrolet Co., a corporation, this defendant and cross-claimant alleges as follows:

I.

Cross-claimant Lawrence Warehouse Company is now and at all times herein mentioned was a corporation organized and existing under and by virtue of the laws of the State of California, having its principal place of business in the City and County of San Francisco, State of California.

II.

Cross-defendant Capitol Chevrolet Company at all times mentioned herein and until on or about June 5, 1944, was a corporation duly organized and existing under and by virtue of the laws of the State of California, having its principal place of

business in the City of Sacramento, County of Sacramento, State of California.

III.

Cross-defendant Capitol Chevrolet Co. is now and ever since on or about the 10th day of April, 1946, has been a corporation duly organized and existing under and by virtue of the laws of the State of California, havings its principal place of business in the City of Sacramento, County of Sacramento, State of California.

IV.

On or about April 15, 1946, in the above-entitled District Court of the United States of America, Northern District of California, Southern Division, in an action filed on February 16, 1944, and then pending in said Court and numbered 23171-G in the Records of said Court, wherein Defense Supplies Corporation was plaintiff and cross-claimant Lawrence Warehouse Company, cross-defendant Capitol Chevrolet Company and V. J. McGrew were defendants, a judgment was duly given, rendered and made by said Court in favor of said Defense Supplies Corporation and against cross-claimant, cross-defendant Capitol Chevrolet Company, and said V. J. McGrew, and each of them, for the principal sum of $41,975.15, together with costs in the sum of $196.55, said sums aggregating the total sum of $42,171.70, with interest thereon from the date of said judgment until paid at the rate of seven percent per annum. On or about June 16, 1949, judgment was entered by the United States

Court of Appeals in said action dismissing the appeals which had been taken therein by cross-defendant Capitol Chevrolet Company and by cross-claimant, and said judgment in said action in favor of Defense Supplies Corporation thereupon became final. Said judgment has not been vacated, set aside or reversed, the appeals taken therefrom have been dismissed, motions for a new trial have been denied, and said judgment is in all respects final and is now in full force and effect.

V.

The said judgment in favor of said Defense Supplies Corporation was rendered against cross-claimant as principal for and because of the negligence of cross-defendant Capitol Chevrolet Company, the agent of cross-claimant, and for no other reason. Cross-claimant is entitled to recover any sums paid by it under said judgment from cross-defendant Capitol Chevrolet Company by virtue of the relationship existing between them. Cross-claimant has paid the sum of $7,425.00 by way of attorneys' fees and the sum of $1,410.44 by way of costs and out-of-pocket expenses in defending said action, and will incur further attorneys' fees, costs and expenses in defending this action. Cross-claimant is entitled to recover said sums from cross-defendant Capitol Chevrolet Company by virtue of the relationship existing between them.

VI.

Cross-claimant is informed and believes and therefore alleges that on or about June 5, 1944,

cross defendant Capitol Chevrolet Company was dissolved and all of its assets and properties transferred to cross-defendant James A. Kenyon, and that said cross-defendant James A. Kenyon in consideration of the transfer to him of the properties and assets of the said corporation assumed and agreed to pay all of the liabilities of said corporation, including the said liability of said cross-defendant to cross-claimant; that thereafter and on or about April 10, 1946, said cross-defendant James A. Kenyon caused to be incorporated cross-defendant Capitol Chevrolet Co. and transferred to said cross-defendant Capitol Chevrolet Co. all or part of the properties and assets which cross-defendant James A. Kenyon had received upon dissolution of cross-defendant Capitol Chevrolet Company, and that said cross-defendant Capitol Chevrolet Co. received and accepted the transfer of the property and assets from cross-defendant James A. Kenyon and then and there and in consideration thereof assumed and agreed to pay the liabilities of said cross-defendant Capitol Chevrolet Company and the liabilities of said cross-defendant James A. Kenyon, including the said liability of said cross-defendant Capitol Chevrolet Company and cross-defendant James A. Kenyon to cross-claimant.

VII.

This action was brought by Reconstruction Finance Corporation upon the judgment in favor of Defense Supplies Corporation referred to in Paragraph IV above, upon the ground that Reconstruc-

tion Finance Corporation is now the owner of said judgment by reason of a joint resolution of the Congress of the United States on June 30, 1945 (c. 215, Public Law 109, 59 Stats. 310) and by reason of the decision of the Supreme Court of the United States regarding said judgment (336 U.S. 631, 93 L. ed. 931). If judgment is entered in this action against cross-claimant and in favor of said Reconstruction Finance Corporation, cross-claimant is entitled to judgment against cross-defendants, and each of them, for the amount of said judgment and for its costs, expenses and attorneys' fees incurred in defending the action referred to in Paragraph IV above and in this action. The amount of said costs, expenses and attorneys' fees which cross-claimant will incur in defending this action are at present unknown to cross-claimant, and cross-claimant prays leave to amend this cross-claim to include said sums when the same shall be ascertained.

And for a second, separate and further cross-claim against defendants and cross-defendants Capitol Chevrolet Company, a corporation, James A. Kenyon, and Capitol Chevrolet Co., a corporation, this defendant and cross-claimant alleges:

I.

Cross-claimant repleads all of the allegations contained in Paragraphs I, II, III and IV of its first cross-claim, to which reference is hereby made, and the same are hereby incorporated in this second

cross-claim and made a part hereof as though set forth in full.

II.

On or about October 1, 1942, cross-claimant entered into a written contract with cross-defendant Capitol Chevrolet Company, a copy of which said agreement is attached hereto, marked Exhibit "A" and made a part hereof as though fully set forth herein.

III.

That said judgment in favor of said Defense Supplies Corporation was rendered against cross-claimant solely because of the failure on the part of cross-defendant Capitol Chevrolet Company to perform its duties and obligations under the said written contract between said cross-defendant and cross-claimant, and for no other reason. Cross-claimant has paid the sum of $7,425.00 by way of attorneys' fees and the sum of $1,410.44 by way of costs and out-of-pocket expenses in defending said action, and will incur further attorneys' fees, costs, and out-of-pocket expenses in defending this action. Cross-defendant Capitol Chevrolet Company agreed in said written contract to idemnify cross-claimant against loss or damage resulting from a failure on the part of said cross-defendant to perform any of the duties and obligations set forth in said contract.

IV.

Cross-claimant repleads all of the allegations contained in Paragraphs VI and VII of its first cross-claim, to which reference is hereby made, and the

same are incorporated in this second cross-claim and made a part hereof as though set forth in full.

Wherefore, defendant and cross-claimant Lawrence Warehouse Company prays judgment that plaintiff take nothing by reason of its said complaint and that defendant be dismissed hence with its costs of suit incurred herein.

Defendant and cross-claimant Lawrence Warehouse Company further prays judgment against defendants and cross-defendants Capitol Chevrolet Company, James A. Kenyon and Capitol Chevrolet Co., and each of them, for the sum of $8,835.44, and for such costs, expenses and attorneys' fees as it may incur in this action; and

If judgment shall be entered in this action in favor of plaintiff and against defendant Lawrence Warehouse Company, that this defendant as cross-claimant may have and recover judgment against cross-defendants Capitol Chevrolet Company, James A. Kenyon, and Capitol Chevrolet Co., for the amount of any judgment which may be rendered in this action against defendant Lawrence Warehouse Company, together with interest that may accrue upon said judgment until the same is paid; and for costs of suit and such other and further relief as may be proper in the premises.

/s/ W. R. WALLACE, JR.
/s/ JOHN R. PASCOE,
WALLACE, GARRISON, NORTON & RAY,
Attorneys for defendant and cross-claimant Lawrence Warehouse Company.

State of California,
City and County of San Francisco—ss.

Louis A. Benoist, being first duly sworn, deposes and says: That he is an officer, to-wit, President of Lawrence Warehouse Company, a corporation, one of the defendants and the cross-claimant in the above entitled action; and as such is authorized to make this verification on its behalf; that he has read the foregoing Answer and Cross-Claim against Certain defendants and knows the contents thereof; that the same is true of his own knowledge, except as to the matters which are therein stated upon information or belief, and as to those matters, he believes it to be true.

/s/ LOUIS A. BENOIST

Subscribed and sworn to before me this 5th day of June, 1951.

[Seal] /s/ SELMA R. CONLAN,
Notary Public in and for the City and County of San Francisco, State of California. My Commission Expires July 5, 1953.

Acknowledgment of Service attached.

EXHIBIT "A"

AGENCY AGREEMENT WITH GOVERNMENT CUSTODIAN

This Agency Agreement dated October 1st, 1942, between Lawrence Warehouse Company, a California corporation, acting as custodian for govern-

mental agencies, and Capitol Chevrolet Company (Name and status, i.e., individual, partnership, corporation, etc.) of....., in the County of....., State of.....

Capitol Chevrolet Company, (hereinafter called Agent) agrees with Lawrence Warehouse Company, acting as custodian for governmental agencies and hereinafter called Principal.

1. To furnish suitable storage space for the storage of such tires and tubes as may be delivered to Agent to the total of available capacity of Agent.

2. To receive such tires and tubes as may be delivered to Agent for the account of Lawrence Warehouse Company as custodian for the Defense Supplies Corporation, or any other governmental agency.

3. To store and safeguard the storage of such tires and tubes as are received by Agent. To keep such tires and tubes separate and apart from any other merchandise whatsoever and to place upon such tires and tubes such evidence of ownership, custodianship, purchase, date of deposit and other information as may be required by the Principal.

4. To issue a receipt evidencing the deposit of such tires and tubes in such form as may be approved by the Principal, and to maintain such records as may be necessary in the opinion of the Principal.

5. To release tires and tubes in possession of Agent only upon instructions from the Principal.

6. To place such distinguishing signs as may be delivered to Agent within the area in which the

tires and tubes are stored to indicate possession by the Principal of the tires and tubes as custodian for the governmental agency or agencies and to indicate ownership by the Government of the United States.

7. To agree that he will at his own cost and expense keep said demised premises in good order and repair, and that the Principal shall not be called upon or required to make any repairs of any kind or nature to, in or about said demised premises. Further, should the Agent wish to be relieved of further participation, it is agreed that he will bear all expenses for the removal and storage of the tires and tubes at a place designated by the Principal.

8. To indemnify the Principal against loss or damage resulting from a failure on the part of the Agent to perform any of the duties or obligations above set forth.

9. The Principal agrees to compensate the Agent for the storage and handling of tires and tubes in the manner above provided at the following rates:

(a) Handling in and out: 3c per tire and 1c per tube.

(b) Storage: 1½c per month per tire and ½c per month per tube.

No other compensation of any kind will be paid by Principal to Agent.

The sums above set forth shall be paid by the Principal to the Agent within ten (10) days after receipt by the Principal from the governmental agency or agencies of sums hereinabove set forth.

10. No Member of or Delegate to the Congress

of the United States of America, or Resident Commissioner, shall be admitted to any share or part of this contract or to any benefit that may arise therefrom, but this provision shall not be construed to extend to this contract so far as it is made with a corporation for its general benefit.

11. In the employment of workers for the performance of this contract, the Agent shall not discriminate against any worker because of race, creed, color or national origin.

12. The Agent shall comply with the requirements of the Walsh-Healy Act (Act of June 30, 1936, 49 Stat. 2036; U.S. Code, Title 41, Sec. 35-45) insofar as such Act is applicable to this transaction.

It is contemplated that the Principal will issue its Warehouse Receipts to the governmental agency or agencies for whom it acts as custodian, and the Agent therefore agrees to deliver regular reports to the Principal as frequently as the Principal may require, evidencing the receipt by it of tires and tubes during that period; to deliver to the Principal copies of all receipts or other documents issued by the Agent and to permit the release of tires and tubes only upon written authority of the Principal.

It is agreed that the Principal shall have the right to examine the records kept by the Agent whenever the Principal desires to do so, and the Agent will assist the Principal in making a physi-

cal inventory of the tires and tubes whenever required.

CAPITOL CHEVROLET
COMPANY
/s/ JAMES A. KENYON, Pres.,
Agent.
LAWRENCE WAREHOUSE
COMPANY,
/s/ By CLYDE HINDRICH,
Principal.

Affidavit of Service by Mail attached.

[Endorsed]: Filed June 6, 1951.

[Title of District Court and Cause No. 30473.]

ANSWER OF CROSS-DEFENDANT CAPITOL CHEVROLET COMPANY

Come now cross-defendant, Capitol Chevrolet Company, a corporation, and for answer to the cross-claim on file herein admits, denies and alleges:

I.

Answering paragraph I of the cross-claim, cross-defendant admits the allegations contained therein.

II.

Answering paragraph II of the cross-claim, cross-defendant denies the allegations contained therein.

III.

Answering paragraph III of the cross-claim,

cross-defendant admits the allegations contained therein.

IV.

Answering paragraph IV of the cross-claim, cross-defendant admits all the allegations contained therein, except that cross-defendant denies that the date on which the judgment became final was June 16, 1949, or on or about that date.

V.

Answering paragraph V of the cross-claim, cross-defendant denies all the allegations therein, except the allegation that cross-claimant has paid the sum of $7,425.00 by way of attorneys' fees and the sum of $1,410.44 by way of costs and out-of-pocket expenses in defending such action, and will incur further attorneys' fees, costs and expenses in defending this action. Cross-defendant denies that it has any knowledge or information sufficient to form a belief as to that allegation therein contained and therefore denies said allegation.

VI.

Answering paragraph VI of the cross-claim, cross-defendant denies the allegations contained therein.

VII.

Answering paragraph VII of the cross-claim, cross-defendant denies that if judgment is entered in this action against cross-claimant and in favor of said Reconstruction Finance Corporation, then cross-claimant is entitled to judgment against cross-

defendant for the amount of said judgment or for its costs, expenses or attorneys' fees incurred in defending the action referred to in Paragraph IV of cross-claimant's first cross-claim. All other allegations contained in paragraph VII are admitted.

VIII.

Cross-defendant denies each and every allegation in the cross-claim not herein admitted, controverted or specifically denied.

First Separate and Distinct Defense.

The claim for relief set forth in the cross-claim did not accrue within two years next before commencement of this action.

Second Separate and Distinct Defense.

The claim for relief set forth in the cross-claim did not accrue within three years next before the commencement of this action.

Third Separate and Distinct Defense.

The claim for relief set forth in the cross-claim did not accrue within four years next before the commencement of this action.

Fourth Separate and Distinct Defense.

The claim for relief set forth in the cross-claim did not accrue within five years next before the commencement of this action.

Fifth Separate and Distinct Defense.

The claim for relief set forth in the cross-claim was previously set forth by cross-claimant against cross-defendant in the action referred to in Para-

graph IV of cross-claimant's first cross-claim. Full opportunity for presentation of the facts and law relating to said claim was afforded cross-claimant therein. Judgment has become final on said action, and cross-claimant is therefore barred from again suing on the same claim for relief.

Sixth Separate and Distinct Defense.

If it is found that cross-defendant's negligence was a cause of the damage on which the judgment sued upon herein is based, then cross-defendant alleges that cross-claimant was equally, jointly and/or contributorily negligent, and for that reason cannot maintain this action.

IX.

Answering paragraph I of cross-claimant's second, separate and further cross-claim, cross-defendant repleads the admissions or denials of paragraphs I, II, III and IV of its answer to the cross-claim, and the same are hereby incorporated in the answer to the second cross-claim and made a part hereof as though set forth in full.

X.

Answering paragraph II of the second cross-claim, cross-defendant admits the allegations contained therein.

XI.

Answering paragraph III of the second cross-claim, cross-defendant admits that it agreed to indemnify cross-claimant against loss or damage resulting from a failure on its part to perform any

of the duties and obligations set forth in said contract. Cross-defendant denies that it has any knowledge or information sufficient to form a belief that cross-claimant has paid the sum of $7,425.00 by way of attorneys' fees and the sum of $1,410.44 by way of costs and out-of-pocket expenses in defending said action, and will incur further attorneys' fees, costs and expenses in defending this action and therefore cross-defendant denies this allegation.

All other allegations contained in said paragraph III are denied.

XII.

Answering paragraph IV of the second cross-claim, cross-defendant repleads paragraphs VI and VII of its answer to the cross-claim, and the same are hereby incorporated in the answer to the second cross-claim and made a part hereof as though set forth in full.

Seventh, Eighth, Ninth, Tenth, Eleventh and Twelfth Separate and Distinct Defenses.

As added, separate and distinct defenses to the second cross-claim, cross-defendant repleads the First, Second, Third, Fourth, Fifth and Sixth Separate and Distinct Defenses set out in its answer to the cross-claim, and the same are hereby incorporated in the answer to the second cross-claim and made a part hereof as though set forth in full.

Wherefore, cross-defendant Capitol Chevrolet Company prays judgment that cross-claimant take

nothing by reason of its said cross-claims and that said cross-claims be dismissed.

DEMPSEY, THAYER, DEIBERT & KUMLER and EARL PATTERSON,

/s/ By ARTHUR H. DEIBERT,

Attorneys for Capitol Chevrolet Company.

Affidavit of Service by Mail attached.

[Endorsed]: Filed July 17, 1951.

[Title of District Court and Cause No. 30473.]

ANSWER OF CROSS-DEFENDANT CAPITOL CHEVROLET CO.

Comes now cross-defendant, Capitol Chevrolet Co., a corporation, and for answer to the cross-claim on file herein admits, denies and alleges:

I.

Answering paragraph I of the cross-claim, cross-defendant admits the allegations contained therein.

II.

Answering paragraph II of the cross-claim, cross-defendant denies the allegations contained therein.

III.

Answering paragraph III of the cross-claim, cross-defendant admits the allegations contained therein.

IV.

Answering paragraph IV of the cross-claim, cross-defendant admits all the allegations contained therein, except that cross-defendant denies that the date on which the judgment became final was June 16, 1949, or on or about that date.

V.

Answering paragraph V of the cross-claim, cross-defendant denies all the allegations therein, except the allegation that cross-claimant has paid the sum of $7,425.00 by way of attorneys' fees and the sum of $1,410.44 by way of costs and out-of-pocket expenses in defending said action, and will incur further attorneys' fees, costs and expenses in defending this action. Cross-defendant denies that it has any knowledge or information sufficient to form a belief as to that allegation therein contained and therefore denies said allegation.

VI.

Answering paragraph VI of the cross-claim, cross-defendant denies the allegations contained therein.

VII.

Answering paragraph VII of the cross-claim, cross-defendant denies that if judgment is entered in this action against cross-claimant and in favor of said Reconstruction Finance Corporation, then cross-claimant is entitled to judgment against cross-defendant for the amount of said judgment or for its costs, expenses or attorneys' fees incurred in defending the action referred to in paragraph IV

of cross-claimant's first cross-claim. All other allegations contained in paragraph VII are admitted.

VIII.

Cross-defendant denies each and every allegation in the cross-claim not herein admitted, controverted or specifically denied.

First Separate and Distinct Defense.

The claim for relief set forth in the cross-claim did not accrue within two years next before commencement of this action.

Second Separate and Distinct Defense.

The claim for relief set forth in the cross-claim did not accrue within three years next before the commencement of this action.

Third Separate and Distinct Defense.

The claim for relief set forth in the cross-claim did not accrue within four years next before the commencement of this action.

Fourth Separate and Distinct Defense.

The claim for relief set forth in the cross-claim did not accrue within five years next before the commencement of this action.

Fifth Separate and Distinct Defense.

The claim for relief set forth in the cross-claim against cross-defendant Capitol Chevrolet Company was previously set forth by cross-claimant against the said Capitol Chevrolet Company in the action referred to in Paragraph IV of cross-claimant's first cross-claim. Full opportunity for presentation of the facts and law relating to said claim was afforded cross-claimant therein. Judgment has be-

come final on said action and cross-claimant is therefore barred from suing on the same claim for relief, or from suing cross-defendant Capitol Chevrolet Co. herein as transferee.

Sixth Separate and Distinct Defense.

If it is found that cross-defendant Capitol Chevrolet Company's negligence was a cause of the damage on which the judgment sued upon herein is based, then cross-defendant alleges that cross-claimant was equally, jointly and/or contributorily negligent, and for that reason cannot maintain this action.

Seventh Separate and Distinct Defense.

The cross-claim fails to state a claim against cross-defendant upon which relief can be granted.

IX.

Answering paragraph I of cross-claimant's second, separate and further cross-claim, cross-defendant repleads the admissions or denials of paragraphs I, II, III and IV of its answer to the cross-claim, and the same are hereby incorporated in the answer to the second cross-claim and made a part hereof as though set forth in full.

X.

Answering paragraph II of the second cross-claim, cross-defendant admits the allegations contained therein.

XI.

Answering paragraph III of the second cross-claim, cross-defendant admits that cross-defendant

Chevrolet Company agreed to indemnify cross-claimant against loss or damage resulting from a failure on its part to perform any of the duties and obligations set forth in said contract. Cross-defendant denies that it has any knowledge or information sufficient to form a belief that cross-complainant has paid the sum of $7,425.00 by way of attorneys' fees and the sum of $1,410.44 by way of costs and out-of-pocket expenses in defending said action, and will incur further attorneys' fees, costs and expenses in defending this action and therefore cross-defendant denies this allegation.

All other allegations contained in said paragraph III are denied.

XII.

Answering paragraph IV of the second cross-claim, cross-defendant repleads paragraphs VI and VII of its answer to the cross-claim, and the same are hereby incorporated in the answer to the second cross-claim and made a part hereof as though set forth in full.

Eighth, Ninth, Tenth, Eleventh, Twelfth, Thirteenth and Fourteenth Separate and Distinct Defenses.

As added, separate and distinct defenses to the second cross-claim, cross-defendant repleads the First, Second, Third, Fourth, Fifth, Sixth and Seventh Separate and Distinct Defenses set out in its answer to the cross-claim, and the same are hereby incorporated in the answer to the second cross-claim and made a part hereof as though set forth in full.

Wherefore, cross defendant Capitol Chevrolet Co. prays judgment that cross-claimant take nothing by reason of its said cross-claims and that said cross-claims be dismissed.

DEMPSEY, THAYER, DEIBERT & KUMLER and EARL PATTERSON

/s/ By ARTHUR H. DEIBERT,
Attorneys for Capitol Chevrolet Co.

Affidavit of Service by Mail attached.

[Endorsed]: Filed July 17, 1951.

[Title of District Court and Cause No. 30473.]

ANSWER OF CROSS-DEFENDANT JAMES A. KENYON

Comes now cross-defendant, James A. Kenyon, and for answer to the cross-claim on file herein admits, denies and alleges:

I.

Answering paragraph I of the cross-claim, cross-defendant admits the allegations contained therein.

II.

Answering paragraph II of the cross-claim, cross-defendant denies the allegations contained therein.

III.

Answering paragraph III of the cross-claim, cross-defendant admits the allegations contained therein.

IV.

Answering paragraph IV of the cross-claim, cross-defendant admits all the allegations contained therein, except that cross-defendant denies that the date on which the judgment became final was June 16, 1949, or on or about that date.

V.

Answering paragraph V of the cross-claim, cross-defendant denies all the allegations therein, except the allegation that cross-claimant has paid the sum of $7,425.00 by way of attorneys' fees and the sum of $1,410.44 by way of costs and out-of-pocket expenses in defending said action, and will incur further attorneys' fees, costs and expenses in defending this action. Cross-defendant denies that he has any knowledge or information sufficient to form a belief as to that allegation therein contained and therefore denies said allegation.

VI.

Answering paragraph VI of the cross-claim, cross-defendant denies the allegations contained therein.

VII.

Answering paragraph VII of the cross-claim, cross-defendant denies that if judgment is entered in this action against cross-claimant and in favor of said Reconstruction Finance Corporation, then cross-claimant is entitled to judgment against cross-defendant for the amount of said judgment or for its costs, expenses or attorneys' fees incurred in

defending the action referred to in paragraph IV of cross-claimant's first cross-claim. All other allegations contained in paragraph VII are admitted.

VIII.

Cross-defendant denies each and every allegation in the cross-claim not herein admitted, controverted or specifically denied.

First Separate and Distinct Defense.

The claim for relief set forth in the cross-claim did not accrue within two years next before commencement of this action.

Second Separate and Distinct Defense.

The claim for relief set forth in the cross-claim did not accrue within three years next before the commencement of this action.

Third Separate and Distinct Defense.

The claim for relief set forth in the cross-claim did not accrue within four years next before the commencement of this action.

Fourth Separate and Distinct Defense.

The claim for relief set forth in the cross-claim did not accrue within five years next before the commencement of this action.

Fifth Separate and Distinct Defense.

The claim for relief set forth in the cross-claim against cross-defendant Capitol Chevrolet Company was previously set forth by cross-claimant against the said Capitol Chevrolet Company in the action referred to in Paragraph IV of cross-claimant's first cross-claim. Full opportunity for presentation of the facts and law relating to said claim was af-

forded cross-claimant therein. Judgment has become final on said action and cross-claimant is therefore barred from suing on the same claim for relief, or from suing cross-defendant James A. Kenyon herein as transferee.

Sixth Separate and Distinct Defense.

If it is found that cross-defendant Capitol Chevrolet Company's negligence was a cause of the damage on which the judgment sued upon herein is based, then cross-defendant alleges that cross-claimant was equally, jointly and/or contributorily negligent, and for that reason cannot maintain this action.

Seventh Separate and Distinct Defense.

The cross-claim fails to state a claim against cross-defendant upon which relief can be granted.

IX.

Answering paragraph I of cross-claimant's second, separate and further cross-claim, cross-defendant repleads the admissions or denials of paragraphs I, II, III and IV of his answer to the cross-claim, and the same are hereby incorporated in the answer to the second cross-claim and made a part hereof as though set forth in full.

X.

Answering paragraph II of the second cross-claim, cross-defendant admits the allegations contained therein.

XI.

Answering paragraph III of the second cross-

claim, cross-defendant admits that cross-defendant Capitol Chevrolet Company agreed to indemnify cross-claimant against loss or damage resulting from a failure on its part to perform any of the duties and obligations set forth in said contract. Cross-defendant denies that he has any knowledge or information sufficient to form a belief that cross-complainant has paid the sum of $7,425.00 by way of attorneys' fees and the sum of $1,410.44 by way of costs and out-of-pocket expenses in defending said action, and will incur further attorneys' fees, costs and expenses in defending this action and therefore cross-defendant denies this allegation.

All other allegations contained in said paragraph III are denied.

XII.

Answering paragraph IV of the second cross-claim, cross-defendant repleads paragraphs VI and VII of his answer to the cross-claim, and the same are hereby incorporated in the answer to the second cross-claim and made a part hereof as though set forth in full.

Eighth, Ninth, Tenth, Eleventh, Twelfth, Thirteenth and Fourteenth Separate and Distinct Defenses.

As added, separate and distinct defenses to the second cross-claim, cross-defendant repleads the first, second, third, fourth, fifth, sixth and seventh separate and distinct defenses set out in his answer to the cross-claim, and the same are hereby incorporated in the answer to the second cross-claim and made a part hereof as though set forth in full.

Wherefore, cross-defendant James A. Kenyon prays judgment that cross-claimant take nothing by reason of its said cross-claims and that said cross-claims be dismissed.

DEMPSEY, THAYER, DEIBERT & KUMLER and EARL PATTERSON,

/s/ By ARTHUR H. DEIBERT,

Attorneys for James A. Kenyon.

Affidavit of Service by Mail attached.

[Endorsed]: Filed July 17, 1951.

[Title of District Court and Cause No. 30473.]

SEPARATE JUDGMENT AGAINST DEFENDANTS LAWRENCE WAREHOUSE COMPANY, SEABOARD SURETY COMPANY, V. J. McGREW, AND CAPITOL CHEVROLET COMPANY.

Pre-trial conference having been held in the above-entitled cause on November 9, 1951, and plaintiff having moved for judgment on the pleadings against defendants Lawrence Warehouse Company, Seaboard Surety Company, V. J. McGrew and Capitol Chevrolet Company, and it appearing to the court that the defendant V. J. McGrew has defaulted and that no issue of fact whatever exists as respects any of said defendants named above, and said defendants Lawrence Warehouse Company, Seaboard Surety Company and Capitol Chev-

rolet Company having been given an opportunity to present memoranda on issues of law and having waived said opportunity, and good cause appearing therefor;

Now, therefore, it is hereby ordered, adjudged and decreed that the plaintiff Reconstruction Finance Corporation do have and recover of and from defendants Lawrence Warehouse Company, Seaboard Surety Company, V. J. McGrew and Capitol Chevrolet Company, jointly and severally, the sum of $42,171.70, plus interest thereon at the rate of 7% per annum from April 15, 1946, to and including the day of entry of this judgment, together with plaintiff's costs of suit herein incurred to be taxed in the manner provided by law and the rules of court, the entire judgment to bear interest from the date of entry at the rate of 7% per annum until paid, and plaintiff shall have execution therefor at any time on or after December 1, 1951, but enforcement of said judgment shall be stayed until December 1, 1951.

Entry of this judgment shall be without prejudice to further prosecution by plaintiff of its suit herein against defendants James A. Kenyon and Capitol Chevrolet Co. or either of them, and it shall be without prejudice to the further prosecution by cross-claimant Lawrence Warehouse Company of its cross-claim against cross-defendants Capitol Chevrolet Company, James A. Kenyon and Capitol Chevrolet Co. or any of them, and it shall be without prejudice to the further prosecution by cross-claimant Seaboard Surety Company of its

cross-claim against the cross-defendant Lawrence Warehouse Company.

Dated: November 20th, 1951.

/s/ LOUIS E. GOODMAN,
United States District Judge.

Approved as to form as provided in Rule 5(d).

/s/ WALLACE, GARRISON, NORTON & RAY, Attorneys for defendant Lawrence Warehouse Company.

/s/ WORTHINGTON, PARK & WORTHINGTON, Attorneys for defendant Seaboard Surety Company.

/s/ HERBERT W. CLARK, Morrison, Hohfeld, Foerster, Shuman & Clark, Attorneys for defendant Capitol Chevrolet Company.

Counsel for defendant Lawrence Warehouse Company having given assurance that the above judgment would be paid on December 1, 1951, we hereby consent that enforcement of the above judgment may be stayed until December 1, 1951.

/s/ MOSES LASKY,
/s/ BROBECK, PHLEGER & HARRISON,
Attorneys for plaintiff Reconstruction Finance Company.

Entered in Civil Docket Nov. 21, 1951.

[Endorsed]: Filed Nov. 20, 1951.

[Title of District Court and Cause No. 30473.]

INTERROGATORIES PROPOUNDED BY CROSS-CLAIMANT LAWRENCE WAREHOUSE COMPANY TO CROSS-DEFENDANT JAMES A. KENYON.

To Cross-Defendant James A. Kenyon and to Messrs. Dempsey, Thayer, Deibert & Kumler, Herbert W. Clark and Messrs. Morrison, Hohfeld, Foerster, Shuman & Clark, his Attorneys:

Pursuant to Rule 33 of the Federal Rules of Civil Procedure, Cross-Claimant Lawrence Warehouse Company hereby submits and propounds the following interrogatories to be answered separately and fully in writing and under oath by Cross-Defendant James A. Kenyon:

1. Were you a stockholder of Capitol Chevrolet Company at any time between October 1, 1942, and June 5, 1944? If so, how many shares of stock of said corporation did you own, and on what dates?

2. Were you a director of Capitol Chevrolet Company at any time between October 1, 1942, and June 5, 1944? If so, state the periods of time involved.

3. Were you an officer of Capitol Chevrolet Company at any time between October 1, 1942, and June 5, 1944? If so, what was your office, and for what periods of time?

4. What assets of Capitol Chevrolet Company were distributed to you prior to the filing of its Certificate of Winding Up and Dissolution on June

5, 1944, or thereafter? What disposition did you make of those assets?

5. What provisions were made for the payment of debts and liabilities of Capitol Chevrolet Company prior to the filing of its Certificate of Winding Up and Dissolution on June 5, 1944, or thereafter?

6. What provisions were made prior to the filing on June 5, 1944, of the Certificate of Winding Up and Dissolution of Capitol Chevrolet Company, or thereafter, for the payment of the liability of Capitol Chevrolet Company in that certain action pending in the District Court of the United States of America, Northern District of California, Southern Division, Numbered 23171-G, entitled "Defense Supplies Corporation, Plaintiff, vs. Lawrence Warehouse Company, a corporation, Capitol Chevrolet Company, a corporation, et al, Defendants"?

7. What provisions were made prior to the filing on June 5, 1944, of the Certificate of Winding Up and Dissolution of Capitol Chevrolet Company, or thereafter, for the payment of any liability of Capitol Chevrolet Company under that certain agreement dated October 1, 1942, by and between Lawrence Warehouse Company and Capitol Chevrolet Company, which said agreement is attached to the cross-claim of Lawrence Warehouse Company in the present action and marked Exhibit "A" therein?

8. Did you at any time assume any liability of Capitol Chevrolet Company? If so, in what form was said assumption and were any instruments

made or executed in connection therewith? If so, describe said instruments and state the location of the originals thereof.

9. Did you at any time assume the liability of Capitol Chevrolet Company under that certain action pending in the District Court of the United States of America, Northern District of California, Southern Division, Numbered 23171-G, entitled "Defense Supplies Corporation, Plaintiff, vs. Lawrence Warehouse Company, a corporation, Capitol Chevrolet Company, a corporation, et al, Defendants?" If so, in what form was said assumption and were any instruments made or executed in connection therewith? If so, describe said instruments and state the location of the originals thereof.

10. Did you at any time assume the liability of Capitol Chevrolet Company under that certain agreement dated October 1, 1942, by and between Lawrence Warehouse Company and Capitol Chevrolet Company, which said agreement is attached to the cross-claim of Lawrence Warehouse Company in the present action and marked Exhibit "A" therein? If so, in what form was said assumption and were any instruments made or executed in connection therewith? If so, describe said instruments and state the location of the originals thereof.

11. Who carried on the business of Capitol Chevrolet Company after the filing of its Certificate of Winding Up and Dissolution on June 5, 1944?

12. In what form of business organization was the business of Capitol Chevrolet Company carried

on after the filing of its Certificate of Winding Up and Dissolution on June 5, 1944?

13. If your answer to interrogatory number 12 is that the business was carried on as a partnership, state the names and capital investments made by all partners, general and limited.

14. Were you on or about the 13th day of February, 1945, the owner of the Capitol Chevrolet Company?

15. Were you at any time on or after April 10, 1946, a stockholder in Capitol Chevrolet Co.? If so, how many shares of stock of said corporation did you own and on what dates?

16. Were you at any time on or after April 10, 1946, a director of Capitol Chevrolet Company? If so, state the periods of time involved.

17. Were you at any time on or after April 10, 1946, an officer of the Capitol Chevrolet Co.? If so, what was your office and for what periods of time?

18. Did you transfer any property or assets to Capitol Chevrolet Co. at any time? If so, state in detail the property or assets which you transferred to that corporation and the dates of transfer.

19. Did Capitol Chevrolet Co. at any time assume any of your liabilities? If so, state what liabilities and on what dates they were assumed. If any written instruments were made or executed in connection with said assumption, describe said instruments and state the location of the originals thereof.

20. If your answer to interrogatory number 8

was in the affirmative, did Capitol Chevrolet Co. at any time assume any liabilities which you assumed from Capitol Chevrolet Company? If so, in what form was said assumption and were any instruments made or executed in connection therewith? If so, describe said instruments and state the location of the originals thereof.

21. If your answer to interrogatory number 9 was in the affirmative, did Capitol Chevrolet Co. at any time assume any liability which you assumed from Capitol Chevrolet Company under that certain action pending in the District Court of the United States of America, Northern District of California, Southern Division, Numbered 23171-G, entitled "Defense Supplies Corporation, plaintiff, vs. Lawrence Warehouse Company, a corporation, Capitol Chevrolet Company, a corporation, et al, defendants?" If so, in what form was said assumption and were any instruments made or executed in connection therewith? If so, describe said instruments and state the location of the originals thereof.

22. If your answer to interrogatory number 10 was in the affirmative, did Capitol Chevrolet Co. at any time assume any liability which you assumed from Capitol Chevrolet Company in connection with that certain agreement dated October 1, 1942, by and between Lawrence Warehouse Company and Capitol Chevrolet Company which said agreement is attached to the cross-claim of Lawrence Warehouse Company in the present action and marked Exhibit "A" therein? If so, in what form was said assumption and were any instruments made or ex-

ecuted in connection therewith? If so, describe said instruments and state the location of the originals thereof.

Dated: November 28, 1951.

/s/ WALLACE, GARRISON, NORTON & RAY,
Attorneys for Lawrence Warehouse Company.

Acknowledgment of Service attached.

[Endorsed]: Filed Nov. 29, 1951.

[Title of District Court and Cause No. 30473.]

INTERROGATORIES PROPOUNDED BY CROSS-CLAIMANT LAWRENCE WAREHOUSE COMPANY TO CROSS-DEFENDANT CAPITOL CHEVROLET COMPANY.

To Cross-Defendant Capitol Chevrolet Company and to Messrs. Dempsey, Thayer, Deibert & Kumler, Herbert W. Clark, Esq., and Messrs. Morrison, Hohfeld, Foerster, Shuman & Clark, its Attorneys:

Pursuant to Rule 33 of the Federal Rules of Civil Procedure, Cross-Claimant Lawrence Warehouse Company hereby submits and propounds the following interrogatories to be answered separately and fully in writing and under oath by Cross-Defendant Capitol Chevrolet Company:

1. What were the names of all of the sharehold-

ers and the number of shares owned by each shareholder of Capitol Chevrolet Company at all times between October 1, 1942, and June 5, 1944?

2. What were the names of the directors of Capitol Chevrolet Company at all times between October 1, 1942, and June 5, 1944?

3. What were the names and respective offices of all of the officers of Capitol Chevrolet Company at all times between October 1, 1942, and June 5, 1944?

4. What provisions were made for the payment of debts and liabilities of Capitol Chevrolet Company prior to the filing of its Certificate of Winding Up and Dissolution on June 5, 1944, or thereafter?

5. What provisions were made prior to the filing on June 5, 1944, of the Certificate of Winding Up and Dissolution of Capitol Chevrolet Company, or thereafter, for the payment of the liability of Capitol Chevrolet Company in that certain action pending in the District Court of the United States of America, Northern District of California, Southern Division, Numbered 23171-G, entitled "Defense Supplies Corporation, Plaintiff, vs. Lawrence Warehouse Company, a corporation, Capitol Chevrolet Company, a corporation, et al, defendants"?

6. What provisions were made prior to the filing on June 5, 1944, of the Certificate of Winding Up and Dissolution of Capitol Chevrolet Company, or thereafter, for the payment of any liability of

Capitol Chevrolet Company under that certain agreement dated October 1, 1942, by and between Lawrence Warehouse Company and Capitol Chevrolet Company, which said agreement is attached to the cross-claim of Lawrence Warehouse Company in the present action and marked Exhibit "A" therein?

7. Were any written instruments made or executed by any person or corporation in connection with the assumption of the debts and liabilities of Capitol Chevrolet Company referred to in interrogatories numbered 4, 5 and 6? If so, describe said instruments and state the location of the originals thereof.

8. To whom and in what amounts were the assets of Capitol Chevrolet Company distributed prior to the filing of its Certificate of Winding Up and Dissolution on June 5, 1944, or thereafter?

9. What assets of Capitol Chevrolet Company were distributed to James A. Kenyon in connection with the dissolution of Capitol Chevrolet Company?

10. Did James A. Kenyon assume any debts or liabilities of Capitol Chevrolet Company upon its dissolution or at any time? If so, what debts or liabilities were assumed and in what form was the assumption thereof by James A. Kenyon? If any written instruments were made or executed in connection with said assumption, describe said instruments and state the location of the originals thereof.

11. What person, persons or corporation carried on the business of Capitol Chevrolet Company after the filing of its Certificate of Winding Up and Dissolution on June 5, 1944?

Dated: November 28, 1951.

/s/ WALLACE, GARRISON, NORTON & RAY,
Attorneys for Lawrence Warehouse Company.

Acknowledgment of Service attached.

[Endorsed]: Filed Nov. 29, 1951.

[Title of District Court and Cause No. 30473.]

INTERROGATORIES PROPOUNDED BY CROSS-CLAIMANT LAWRENCE WAREHOUSE COMPANY TO CROSS-DEFENDANT CAPITOL CHEVROLET CO.

To Cross-Defendant Capitol Chevrolet Co. and to Messrs. Dempsey, Thayer, Deibert & Kumler, Herbert W. Clark and Messrs. Morrison, Hohfeld, Foerster, Shuman & Clark, its Attorneys:

Pursuant to Rule 33 of the Federal Rules of Civil Procedure, Cross-Claimant Lawrence Warehouse Company hereby submits and propounds the following interrogatories to be answer separately and fully in writing and under oath by Cross-Defendant Capitol Chevrolet Co.:

1. When was Capitol Chevrolet Co. incorporated?

2. Who were the stockholders and the number of shares of stock held by each stockholder from the date of incorporation of Capitol Chevrolet Co. to the present date?

3. Who were the directors of Capitol Chevrolet Co. at all times from the date of its incorporation to the present date?

4. Who were the officers of Capitol Chevrolet Co. and their respective offices at all times from the date of its incorporation to the present date?

5. What interest has James A. Kenyon had in Capitol Chevrolet Co. at all times from the date of its incorporation to the present date?

6. What money or other property or assets did James A. Kenyon contribute, for stock or otherwise, to Capitol Chevrolet Co. at any time between the date of its incorporation and the present date?

7. Did Capitol Chevrolet Co. at any time assume any liability or liabilities of James A. Kenyon? If so, state what liabilities and upon what dates they were assumed. If any written instruments were made or executed in connection with said assumption, describe said instruments and state the location of the originals thereof.

8. Did Capitol Chevrolet Co. at any time assume any liability of James A. Kenyon or of any other person or corporation under that certain action pending in the District Court of the United States

of America, Northern District of California, Southern Division, Numbered 23171-G, entitled "Defense Supplies Corporation, Plaintiff, vs. Lawrence Warehouse Company, a corporation, Capitol Chevrolet Company, a corporation, et al, defendants?" If so, in what form was said assumption and were any written instruments made or executed in connection therewith? If so, describe said instruments and state the location of the originals thereof.

9. Did Capitol Chevrolet Co. at any time assume any liability of James A. Kenyon or of any other person or corporation in connection with that certain agreement dated October 1, 1942, by and between Lawrence Warehouse Company and Capitol Chevrolet Company which said agreement is attached to the cross-claim of Lawrence Warehouse Company in the present action and marked Exhibit "A" therein? If so, in what form was said assumption and were any written instruments made or executed in connection therewith? If so, describe said instruments and state the location of the originals thereof.

Dated: November 28, 1951.

/s/ WALLACE, GARRISON, NORTON & RAY,
Attorneys for Lawrence Warehouse Company.

Acknowledgment of Service attached.

[Endorsed]: Filed Nov. 29, 1951.

[Title of District Court and Cause No. 30473.]

ASSIGNMENT OF JUDGMENT

Know All Men by These Presents:

That Reconstruction Finance Corporation, a Federal corporation created by and organized under an act of Congress of the United States, in consideration of the sum of Fifty-eight Thousand Eight Hundred Fifty-nine Dollars and Ninety Cents ($58,859.90), paid to it by Lawrence Warehouse Company, a corporation, the receipt of which sum is hereby acknowledged, has assigned and by these presents does assign unto the said Lawrence Warehouse Company the separate judgment for the use and benefit of Reconstruction Finance Corporation, plaintiff in said action, and against defendants Lawrence Warehouse Company, Seaboard Surety Company, V. J. McGrew and Capitol Chevrolet Company, for the sum of Forty-two Thousand One Hundred Seventy-one Dollars and Seventy Cents ($42,171.70) plus interest thereon at the rate of Seven Per Cent (7%) per annum from April 15, 1946, to and including the 21st day of November, 1951, with costs in the sum of Twenty Dollars ($20.00), which said judgment was entered in the within cause on the 21st day of November, 1951; and

There is hereby assigned to said Lawrence Warehouse Company all right and power to collect and enforce payment of said judgment, but said Reconstruction Finance Corporation will not be held

liable for any expense or damage which may arise from the collection and enforcement of said judgment.

In Witness Whereof, this assignment has been made and executed this 29th day of November, 1951.

RECONSTRUCTION FINANCE CORPORATION,
/s/ By PAUL V. WAGNER,
Acting Manager.

Approved:

/s/ BROBECK, PHLEGER & HARRISON
Attorneys for Reconstruction Finance Corporation

[Endorsed]: Filed December 7, 1951.

[Title of District Court and Cause No. 30473.]

NOTICE OF PAYMENT OF JUDGMENT AND CLAIM TO CONTRIBUTION OR REPAYMENT

To C. W. Calbreath, Clerk of the Above-Entitled Court:

You will please take notice that on the 21st day of November, 1951, Reconstruction Finance Corporation, plaintiff above named, recovered a separate judgment in the within cause against defendants Lawrence Warehouse Company, Seaboard Surety Company, V. J. McGrew and Capitol Chevrolet Company, for the sum of Forty-Two

Thousand One Hundred Seventy-One Dollars and Seventy Cents ($42,171.70) plus interest at the rate of Seven Per Cent (7%) per annum from April 15, 1946, to and including the 21st day of November, 1951, and Twenty Dollars ($20.00) costs of suit.

You are further notified that on the 1st day of December, 1951, defendant Lawrence Warehouse Company, a corporation, while said judgment and the whole thereof was in full force and effect, paid to the Reconstruction Finance Corporation the sum of Fifty-Eight Thousand Eight Hundred Fifty-Nine Dollars and Ninety Cents ($58,859.90) in full payment, discharge and satisfaction of said judgment.

You are further notified that the defendant Lawrence Warehouse Company, a corporation, claims the right to contribution or repayment from its co-defendant Capitol Chevrolet Company, a corporation, of the full sum of said judgment, and in order that the defendant Lawrence Warehouse Company may be entitled to the benefit of said judgment for the purpose of enforcing contribution or repayment from the said co-defendant Capitol Chevrolet Company, you are requested upon the filing of this notice to make an entry thereof in the margin of the docket.

Dated: December 6th, 1951.

/s/ WALLACE, GARRISON, NORTON & RAY,
Attorneys for defendant Lawrence Warehouse Company

[Endorsed]: Filed December 7, 1951.

[Title of District Court and Cause No. 30473.]

FIRST AMENDED ANSWER TO CROSS-COMPLAINT

Comes now each of the cross-defendants, Capitol Chevrolet Company, a corporation, James A. Kenyon and Capitol Chevrolet Co., a corporation, and, severally and not jointly, answers severally each of the two cross-claims averred in the cross-complaint of Lawrence Warehouse Company, a corporation, on file herein as follows:

As and for a First Defense to the First Cross-Claim averred in the cross-complaint of Lawrence Warehouse Company, a corporation, on file herein, each of said cross-defendants, severally and not jointly, admits, denies and avers as follows:

I.

Cross-defendants deny the averments of paragraph II.

II.

Cross-defendants admit the averments of paragraph I and III.

III.

Answering paragraph IV, cross-defendants deny that the judgment in Civil Action No. 23171-G in the United States District Court for the Northern District of California became final on or about June 16, 1949, or at any time after April 15, 1946. Except as in this paragraph denied, defendants admit the averments of paragraph IV.

IV.

Answering paragraph V, cross-defendants state that they are without knowledge or information sufficient to form a belief as to the truth of the averments in said paragraph that cross-claimant has paid the sum of $7,425.00 by way of attorneys' fees and the sum of $1,410.44 by way of costs and out-of-pocket expense in defending said Civil Action No. 23171-G and will incur further attorneys' fees, costs and expenses in defending this action. They deny the remaining averments of paragraph V.

V.

Answering paragraph VI, cross-defendants admit that on or about May 31, 1943, James A. Kenyon and Adams Service Co. agreed that upon the transfer to them of the assets of Capitol Chevrolet Company they would assume and agree to pay all the debts, liabilities and obligations of said Capitol Chevrolet Company. Except as in this paragraph admitted, they deny the averments of paragraph VI.

VI.

Answering paragraph VII, cross-defendants admit the averments of the first sentence in said paragraph, and they deny the remaining averments of said paragraph.

As and for a Second Defense to the First Cross-Claim averred in the cross-complaint of Lawrence Warehouse Company, a corporation, on file herein, each of said cross-defendants, severally and not jointly, avers as follows:

I.

The first cross-claim fails to state facts sufficient to state a claim against cross-defendants, or any of them, upon which relief can be granted.

As and for a Third Defense to the First Cross-Claim averred in the cross-complaint of Lawrence Warehouse Company, a corporation, on file herein, each of said cross-defendants, severally and not jointly, avers as follows:

I.

Said cross-claim is barred by subsection 3 of section 341 of the California Code of Civil Procedure, and the claims therein set forth did not accrue within six months next before the commencement of this action.

As and for a Fourth Defense to the First Cross-Claim averred in the cross-complaint of Lawrence Warehouse Company, a corporation, on file herein, each of said cross-defendants, severally and not jointly, avers as follows:

I.

Said cross-claim is barred by subsection 1 of section 339 of the California Code of Civil Procedure, and the claims therein set forth did not accrue within two years next before the commencement of this action.

As and for a Fifth Defense to the First Cross-Claim averred in the cross-complaint of Lawrence Warehouse Company, a corporation, on file herein, each of said cross-defendants, severally and not jointly, avers as follows:

I.

Said cross-claim is barred by subsection 4 of section 338 of the California Code of Civil Procedure, and the claims therein set forth did not accrue within three years next before the commencement of this action.

As and for a Sixth Defense to the First Cross-Claim averred in the cross-complaint of Lawrence Warehouse Company, a corporation, on file herein, each of said cross-defendants, severally and not jointly, avers as follows:

I.

Said cross-claim is barred by subsection 1 of section 337 of the California Code of Civil Procedure, and the claims therein set forth did not accrue within four years next before the commencement of this action.

As and for a Seventh Defense to the First Cross-Claim averred in the cross-complaint of Lawrence Warehouse Company, a corporation, on file herein, each of said cross-defendants, severally and not jointly, avers as follows:

I.

Said cross-claim is barred by section 343 of the California Code of Civil Procedure, and the claims therein set forth did not accrue within four years next before the commencement of this action.

As and for an Eighth Defense to the First Cross-Claim averred in the cross-complaint of Lawrence Warehouse Company, a corporation, on file herein, each of said cross-defendants, severally and not jointly, avers as follows:

I.

Said cross-claim is barred by subsection 1 of section 336 of the California Code of Civil Procedure, and the claims therein set forth did not accrue within five years next before the commencement of this action.

As and for a Ninth Defense to the First Cross-Claim averred in the cross-complaint of Lawrence Warehouse Company, a corporation, on file herein, each of said cross-defendants, severally and not jointly, avers as follows:

I.

In said Civil Action No. 23171-G in the United States District Court for the Northern District of California it was ordered, adjudged and decreed that Defense Supplies Corporation, the plaintiff therein, have and recover from defendants therein Lawrence Warehouse Company, a corporation, and cross-claimant herein, Capitol Chevrolet Company, a corporation, and one of the cross-defendants herein, and V. J. McGrew, jointly and severally, the sum of $41,975.15, together with plaintiff's costs and disbursements in said action.

II.

In said Civil Action No. 23171-G in the United States District Court for the Northern District of California the Court found that said Lawrence Warehouse Company failed and omitted to exercise reasonable care and diligence for the protection and preservation of goods of plaintiff therein, and said Court further found that the negligence of de-

fendants in said action, V. J. McGrew, said Lawrence Warehouse Company and said Capitol Chevrolet Company, concurred and joined together.

As and for a Tenth Defense to the First Cross-Claim averred in the cross-complaint of Lawrence Warehouse Company, a corporation, on file herein, each of said cross-defendants, severally and not jointly, avers as follows:

I.

Cross-claimant Lawrence Warehouse Company was equally, jointly and contributorily negligent, or negligent in any of said ways, with cross-defendant Capitol Chevrolet Company, in causing the damage for which judgment was rendered in Civil Action No. 23171-G in the United States District Court for the Northern District of California, if said Capitol Chevrolet Company were negligent at all or if any negligence of said Capitol Chevrolet Company caused or contributed to the cause of said damage.

II.

Cross-claimant Lawrence Warehouse Company had knowledge of, acquiesced in and consented to any negligence, if any there were, of said Capitol Chevrolet Company which caused or contributed to the cause of the damage for which judgment was rendered in said Civil Action No. 23171-G.

As and for an Eleventh Defense to the First Cross-Claim averred in the cross-complaint of Lawrence Warehouse Company, a corporation, on file

herein, each of said cross-defendants, severally and not jointly, aver as follows:

I.

The claims of cross-claimant Lawrence Warehouse Company set forth in this action were set forth in Civil Action No. 23171-G in the United States District Court for the Northern District of California by cross-claimant herein Lawrence Warehouse Company against cross-defendant herein Capitol Chevrolet Company and final judgment has been rendered in said Civil Action No. 23171-G barring said Lawrence Warehouse Company from reasserting said claims in this action, or at all.

As and for a First Defense to the Second Cross-Claim averred in the cross-complaint of Lawrence Warehouse Company, a corporation, on file herein, each of said cross-defendants, severally and not jointly, admits, denies and avers as follows:

I.

Cross-defendants admit the averments in paragraph II.

II.

Cross-defendants reaver, incorporate, and make a part hereof as though fully set forth herein, paragraphs I, II, III, V and VI of their First Defense to the First Cross-Claim.

III.

Answering paragraph III, cross-defendants admit

that on or about October 2, 1952, Capitol Chevrolet Company entered into a written contract with cross-claimant Lawrence Warehouse Company, a copy of which is Exhibit A attached to the answer and cross-claim herein of said Lawrence Warehouse Company. Cross-defendants state that they are without knowledge or information sufficient to form a belief as to the truth of the averments in said paragraph that cross-claimant has paid the sum of $7,425.00 by way of attorneys' fees and the sum of $1,410.44 by way of costs and out-of-pocket expenses in defending Civil Action No. 23171-G in the United States District Court for the Northern District of California and will incur further attorneys' fees, costs and out-of-pocket expenses in defending this action. Except as herein admitted they deny the remaining averments of paragraph III.

As and for Second, Third, Fourth, Fifth, Sixth, Seventh, Eighth, Ninth, Tenth and Eleventh Defenses to the Second Cross-Claim averred in the cross-complaint of Lawrence Warehouse Company, a corporation, on file herein, each of said cross-defendants, severally and not jointly, reaver, incorporate and make a part hereof as though fully set forth herein, the averments in their Second, Third, Fourth, Fifth, Sixth, Seventh, Eighth, Ninth, Tenth and Eleventh Defenses to the First Cross-Claim.

Wherefore, cross-defendants Capitol Chevrolet Company, James A. Kenyon and Capitol Chevrolet Co. pray that cross-claimant Lawrence Warehouse Company take nothing by this action and that cross-

defendants be awarded their costs of suit herein incurred.

Dated: San Francisco, January 3, 1952.

/s/ JAMES B. ISAACS
/s/ DEMPSEY, THAYER, DEIBERT & KUMLER
/s/ HERBERT W. CLARK
/s/ RICHARD J. ARCHER
/s/ MORRISON, HOHFELD, FOERSTER, SHUMAN & CLARK

Attorneys for Cross-Defendants Capitol Chevrolet Company, James A. Kenyon and Capitol Chevrolet Co.

Plaintiff Reconstruction Finance Corporation hereby consents to the filing of this First Amended Answer to Cross-Complaint.

/s/ BROBECK, PHLEGER & HARRISON

Defendant and Cross-Claimant Lawrence Warehouse Company hereby consents to the filing of this First Amended Answer to Cross-Complaint.

/s/ MAYNARD GARRISON, WALLACE, GARRISON, NORTON & RAY

Acknowledgment of Service attached.

[Endorsed]: Filed January 4, 1952.

[Title of District Court and Cause No. 30473.]

ANSWERS TO INTERROGATORIES PROPOUNDED BY CROSS-CLAIMANT LAWRENCE WAREHOUSE COMPANY TO CROSS-DEFENDANT CAPITOL CHEVROLET COMPANY

Pursuant to Rule 33 of the Federal Rules of Civil Procedure, Cross-Defendant Capitol Chevrolet Company hereby submits answers to the interrogatories propounded by Cross-Claimant Lawrence Warehouse Company on November 28, 1951.

1. The names of all of the shareholders and the number of shares owned by each shareholder of Capitol Chevrolet Company at all times between October 1, 1942 and June 5, 1944 are as follows: James A. Kenyon, 325 shares; Adams Service Co., 325 shares.

2. The names of the directors of Capitol Chevrolet Company at all times between October 1, 1942 and June 5, 1944 were: James A. Kenyon, G. A. Kenyon, and G. M. Westerfeld.

3. The names and respective offices of all the officers of Capitol Chevrolet Company at all times between October 1, 1942 and June 5, 1944 were: President, James A. Kenyon; Vice-President, G. A. Kenyon; Secretary, G. M. Westerfeld.

4. The debts and liabilities of Capitol Chevrolet Company were assumed by its shareholders upon dissolution.

5. The assumption referred to in the answer to Interrogatory No. 4 was a general assumption which would include the specific liability, if any, referred to in Interrogatory No. 5.

6. The assumption referred to in the answer to Interrogatory No. 4 was a general assumption which would include the specific liability, if any, referred to in Interrogatory No. 6.

7. The assumptions referred to in Interrogatories 4, 5 and 6 were made in writing in a ratification and approval of all the stockholders of Capitol Chevrolet Company of a resolution adopted at a special meeting of the Board of Directors of the Capitol Chevrolet Company on the 31st day of May, 1943.

The location of the originals thereof are not known. A copy from the personal file of Mr. Kenyon is attached thereto and marked "Exhibit A".

8. The assets of Capitol Chevrolet Company were distributed in equal shares to the two shareholders, Adams Service Co. and James A. Kenyon.

9. An undivided 50 per cent interest in Capitol Chevrolet Company was distributed to James A. Kenyon.

10. See answers to interrogatories numbers 4, 5, 6 and 7.

11. The business of the Capitol Chevrolet Company was carried on by Capitol Chevrolet Company, a limited partnership; James A. Kenyon was the

General Partner, and Adams Service Co., was the limited partner.

Dated: December 27, 1951.

CAPITOL CHEVROLET
COMPANY
/s/ By JAMES A. KENYON

Subscribed and sworn to before me, this 27th day of December, 1951.

[Seal] /s/ RUTH M. SUTTON
Notary Public in and for the California State and Sacramento County. My commission expires August 20, 1955.

EXHIBIT "A"

Ratification and Approval of All of the Stockholders of Capitol Chevrolet Company of the Resolution Adopted at the Special Meeting of the Board of Directors of Capitol Chevrolet Company on the 31st Day of May, 1943.

We, being the sole stockholders of Capitol Chevrolet Company, do hereby ratify and approve the foregoing and above referred to Resolution and do hereby consent to and authorize the election of said corporation to wind up and dissolve; and do hereby agree that upon the transfer to us of the assets of said corporation, we will assume and agree to pay all the debts, liabilities and obligations of said corporation, and will assume and perform any and all leases under or upon which the said corporation is

now the lessee; and do further authorize the President and Secretary to have prepared and filed a Certificate of Election to Wind Up and Dissolve.

Affidavit of Service by Mail attached.

[Endorsed]: Filed January 9, 1952.

[Title of District Court and Cause No. 30473.]

ANSWERS TO INTERROGATORIES PROPOUNDED BY CROSS-CLAIMANT LAWRENCE WAREHOUSE COMPANY TO CROSS-DEFENDANT CAPITOL CHEVROLET CO.

Pursuant to Rule 33 of the Federal Rules of Civil Procedure, Cross-Defendant Capitol Chevrolet Co. hereby submits the following answers to interrogatories propounded by Cross-Claimant Lawrence Warehouse Company, dated November 28, 1951:

1. Capitol Chevrolet Co. was incorporated April 10, 1946.

2. The stockholders and the number of shares held by each are as follows:

(a) From April 10, 1946 to December 21, 1949—F. Norman Phelps, 213 shares; Alice Phelps, 212 shares; James A. Kenyon, Trustee of Patricia May Kenyon Trust, 170 shares; J.A.K. Co., 255 shares.

(b) From December 21, 1949 to July 26, 1950—F. Norman Phelps, 148 shares; Alice Phelps, 147 shares; James A. Kenyon, Trustee of Patricia May Kenyon Trust, 40 shares; J.A.K. Co., 255 shares.

(c) From July 26, 1950 to present: F. Norman Phelps, 148 shares; Alice Phelps, 147 shares.

3. The directors of Capitol Chevrolet Co. are as follows:

(a) From April 10, 1946 to July 26, 1950—James A. Kenyon, F. Norman Phelps, Alice Phelps.

(b) From July 26, 1950 to present—F. Norman Phelps, Alice Phelps, P. J. Moffatt.

4. The officers of Capitol Chevrolet Co. are as follows:

(a) From April 10, 1946 to July 26, 1950—F. Norman Phelps, President; James A. Kenyon, Vice-President; Alice Phelps, Secretary-Treasurer.

(b) From July 26, 1950 to present: F. Norman Phelps, President; P. J. Moffatt, Vice-President; Alice Phelps, Secretary-Treasurer.

5. James A. Kenyon has never had any interest in Capitol Chevrolet Co. as an individual. However, as shown in answer to Interrogatory No. 2, the J.A.K. Co. and James A. Kenyon, Trustee, have held interests in this corporation. Mr. Kenyon at all times from April 10, 1946 to July 26, 1950 was sole shareholder of the J.A.K. Co.

6. All of the original shareholders of Capitol Chevrolet Co. contributed their interests in Capitol Chevrolet Co., limited partnership, as their contribution to capital of Capitol Chevrolet Co., the corporation.

7. No.

8. No.
9. No.

Dated: December 24th, 1951.

CAPITOL CHEVROLET CO.
/s/ By P. J. MOFFATT,
Vice President.

Subscribed and sworn to before me this 24th day of December, 1951.

[Seal] /s/ G. M. WESTERFELD,
Notary Public in and for the County of Sacramento, State of California.

EXHIBIT "A"

Ratification and Approval of All of the Stockholders of Capitol Chevrolet Company of the Resolution Adopted at the Special Meeting of the Board of Directors of Capitol Chevrolet Company on the 31st Day of May, 1931.

We, being the sole stockholders of Capitol Chevrolet Company, do hereby ratify and approve the foregoing and above referred to Resolution and do hereby consent to and authorize the election of said corporation to wind up and dissolve; and do hereby agree that upon the transfer to us of the assets of said corporation, we will assume and agree to pay all the debts, liabilities and obligations of said corporation, and will assume and perform any and all leases under or upon which the said corporation is now the lessee; and do further authorize the

President and Secretary to have prepared and filed a Certificate of Election to Wind Up and Dissolve.

Affidavit of Service by Mail attached.

[Endorsed]: Filed January 9, 1952.

[Title of District Court and Cause No. 30473.]

AMENDMENT TO CROSS-CLAIM OF LAWRENCE WAREHOUSE COMPANY

Comes Now Cross-Claimant Lawrence Warehouse Company, and pursuant to Stipulation signed and filed herein on January 9th, 1952 amends its cross-claim herein by changing the following numbered paragraphs to read as follows:

I.

Paragraph III of said Cross-Claim is amended by adding the following words thereto:

"Cross-defendant Adams Service Co. at all times mentioned herein was a corporation organized and existing under and by virtue of the laws of the State of Nevada. Cross-defendants F. Norman Phelps and Alice Phelps were at all times mentioned herein the sole stockholders of cross-defendant Adams Service Co., and cross-claimant is informed and believes and therefore alleges that cross-defendant Adams Service Co. has never maintained any office and has never done any business or exercised any corporate functions except to hold stock in other corporations in its name for and on

behalf of cross-defendants F. Norman Phelps and Alice Phelps, and all of its acts were the acts of cross - defendants F. Norman Phelps and Alice Phelps. Cross-defendant J. A. K. Co. at all times mentioned herein was a corporation organized and existing under and by virtue of the laws of the State of Nevada. Cross-defendant James A. Kenyon was at all times mentioned herein the sole stockholder of cross-defendant J. A. K. Co., and cross-claimant is informed and believes and therefore alleges that cross-defendant J. A. K. Co. has never maintained any office and has never done any business or exercised any corporate functions except to hold stock in other corporations in its name for and on behalf of cross-defendant James A. Kenyon, and all of its acts were the acts of cross-defendant James A. Kenyon."

II.

Paragraph VI of said Cross-claim is amended to read as follows:

"VI.

"Cross-claimant is informed and believes and therefore alleges that at all times mentioned herein cross-defendants James A. Kenyon and Adams Service Co. were the sole stockholders of cross-defendant Capitol Chevrolet Company, and that on or about May 31, 1943 the said stockholders of Capitol Chevrolet Company consented to the dissolution of said corporation; and that on or about June 5, 1944, cross-defendant Capitol Chevrolet Company filed with the Secretary of State of the

State of California its Certificate of Winding Up and Dissolution; that upon the dissolution of said cross-defendant Capitol Chevrolet Company all of its assets and properties were transferred to cross-defendants James A. Kenyon and Adams Service Co., and that cross-defendants James A. Kenyon and Adams Service Co., in consideration of the transfer to them of the properties and assets of the said corporation, assumed and agreed in writing to pay all of the debts, liabilities and obligations of said corporation, including the said liability of said cross-defendant Capitol Chevrolet Company to cross-claimant; that thereafter, and on or about April 10, 1946, cross-defendants James A. Kenyon and Adams Service Co. caused to be incorporated cross-defendant Capitol Chevrolet Co., causing the stock thereof to be issued in the names of (1) cross-defendant James A. Kenyon as trustee for his daughter, (2) cross-defendant J. A. K. Co., (3) cross-defendant F. Norman Phelps and (4) cross-defendant Alice Phelps; that cross-defendants James A. Kenyon and Adams Service Co. transferred to cross-defendant Capitol Chevrolet Co. all or part of the property and assets which cross-defendants James A. Kenyon and Adams Service Co. had received upon the dissolution of cross-defendant Capitol Chevrolet Company, and that cross defendant Capitol Chevrolet Co. received and accepted the transfer of the property and assets from cross-defendants James A. Kenyon and Adams Service Co. and then and there and in consideration thereof assumed and agreed to pay the liabilities of cross-

defendant Capitol Chevrolet Company and the liabilities of cross-defendants James A. Kenyon and Adams Service Co., including the said liability of cross-defendants Capitol Chevrolet Company, James A. Kenyon, and Adams Service Co. to cross-claimant."

III.

The second and third paragraphs of the prayer of said cross-claim are amended to read as follows:

"Defendant and cross-claimant Lawrence Warehouse Company further prays judgment against defendants and cross-defendants Capitol Chevrolet Company, James A. Kenyon, Capitol Chevrolet Co., Adams Service Co., J. A. K. Co., F. Norman Phelps and Alice Phelps, and each of them, for the sum of $8,835.44, and for such costs, expenses and attorneys' fees as it may incur in this action; and

"If judgment shall be entered in this action in favor of plaintiff and against defendant Lawrence Warehouse Company, that this defendant as cross-claimant may have and recover judgment against cross-defendants Capitol Chevrolet Company, James A. Kenyon, Capitol Chevrolet Co., Adams Service Co., J. A. K. Co., F. Norman Phelps and Alice Phelps, for the amount of any judgment which may be rendered in this action against defendant Lawrence Warehouse Company, together with interest that may accrue upon said judgment until the same

is paid; and for costs of suit and such other and further relief as may be proper in the premises."

Dated: February 15th, 1952.

/s/ W. R. WALLACE, Jr.,
/s/ MAYNARD GARRISON,
/s/ JOHN R. PASCOE,
/s/ WALLACE, GARRISON, NORTON & RAY,

Attorneys for defendant and cross-claimant Lawrence Warehouse Company.

Leave granted to file this 15th day of Feb., 1952.

/s/ LOUIS E. GOODMAN,
U. S. District Judge.

Acknowledgment of Service attached.

[Endorsed]: Filed February 15, 1952.

[Title of D. C. and Causes Nos. 23171-30473.]

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The above-entitled consolidated actions came on regularly for trial of cross-claims on the 6th day of March, 1952, upon the evidence then introduced and upon the evidence introduced at the trial of said above-entitled cause No. 23171 on the 13th, 14th and 15th days of February, 1945, before the Court sitting without a jury, Maynard Garrison, Esq., John R. Pascoe, Esq., and Messrs. Wallace, Garrison, Norton & Ray appearing for cross-claim-

ant, Lawrence Warehouse Company, and James B. Isaacs, Esq., and Messrs. Dempsey, Thayer, Deibert & Kumler and Herbert W. Clark, Esq., and Richard J. Archer, Esq., and Messrs. Morrison, Hohfeld, Foerster, Shuman & Clark, appearing for cross-defendants, Capitol Chevrolet Company, James A. Kenyon, Capitol Chevrolet Co., Adams Service Co., J. A. K. Co., F. Norman Phelps and Alice Phelps.

Evidence both oral and documentary having been introduced and the cause having been fully heard and tried and the Court having rendered its written opinion and order that judgment go in favor of Lawrence Warehouse Company on its cross-claims in No. 23171 against Capitol Chevrolet Company and in favor of Lawrence Warehouse Company, in No. 30473 against James A. Kenyon, Adams Service Co., F. Norman Phelps and Alice Phelps, and that the cross-claims of Lawrence Warehouse Company against Capitol Chevrolet Company, Capitol Chevrolet Co., and J. A. K. Co., in No. 30473 be dismissed, now makes its Findings of Fact as follows:

Findings of Fact

I.

That at all of the times herein mentioned Lawrence Warehouse Company was a corporation duly organized and existing under and by virtue of the laws of the State of California.

II.

That at all of the times herein mentioned prior

to the 5th day of June, 1944, Capitol Chevrolet Company was a corporation duly organized and existing under and by virtue of the laws of the State of California.

III.

That all of the allegations contained in paragraph I of the Complaint of Defense Supplies Corporation are, and each of them is, true. That all of the allegations contained in paragraphs I, II, VII, IX, XI, and XII of the Complaint of Reconstruction Finance Corporation are, and each of them, is true.

IV.

That on or about the 1st day of March, 1943, cross-defendant Capitol Chevrolet Company entered into an agreement of lease of certain premises known as the "Ice Palace" and situated in West Sacramento, Yolo County, California; the said premises so leased were to be used by said cross-defendant for the purpose of storing tires and tubes belonging to plaintiff, Defense Supplies Corporation.

V.

That on or about April 9, 1943, while tires and tubes belonging to plaintiff, Defense Supplies Corporation, were so stored in said Ice Palace, Capitol Chevrolet Company negligently consented to and approved the entry of one V. J. McGrew into said "Ice Palace" and its attached engine and boiler room without ascertaining his intentions. That at said time and place said cross-defendant Capitol Chevrolet Company negligently failed to main-

tain adequate safeguards against fire. That said V. J. McGrew employed a torch in said engine and boiler room and in consequence of the negligent use thereof, and in consequence of the negligence of cross-defendant, Capitol Chevrolet Company, in failing to ascertain his intentions and prevent the use of said torch in view of the hazard involved and the lack of fire-fighting equipment, and its negligence in failing to maintain adequate safeguards against fire, a fire broke out and said "Ice Palace" and said tires and tubes were wholly destroyed and consumed by said fire.

VI.

That at all of the aforesaid times said cross-defendant Capitol Chevrolet Company was acting as agent of cross-claimant, Lawrence Warehouse Company, and that said cross-claimant did not have actual knowledge of or actually or affirmatively consent to or participate in any of the said negligent acts of Capitol Chevrolet Company.

VII.

That such agency of cross-defendant Capitol Chevrolet Company for cross-claimant, Lawrence Warehouse Company, was undertaken pursuant to a contract in writing dated the 1st day of October, 1942, wherein and whereby among other things said cross-defendant agreed to store and safeguard the storage of tires and tubes to be delivered to it by cross-claimant for plaintiff, Defense Supplies Corporation, and wherein and whereby said cross-defendant undertook and agreed to indemnify cross-

claimant against loss or damage resulting from a failure on the part of said cross-defendant to perform any of the duties and obligations imposed upon said cross-defendant under said agreement among which duties was the duty herein first set forth. That said above-mentioned tires and tubes stored in said "Ice Palace" by said cross-defendant were delivered to it by cross-claimant, Lawrence Warehouse Company, pursuant to the aforesaid terms and conditions of said above-mentioned written contract.

VIII.

That on or about the 31st day of December, 1943, all of the assets of said cross-defendant Capitol Chevrolet Company were transferred by it to James A. Kenyon and Adams Service Co., cross-defendants in No. 30473. That from and after the said transfer, said transferees actively participated in the defense of the complaint of Defense Supplies Corporation against defendants and in the defense of the cross-claim of Lawrence Warehouse Company against Capitol Chevrolet Company in said action No. 23171. That said cross-defendant transferees were the sole stockholders of cross-defendant Capitol Chevrolet Company, and at or about the time of said transfer of assets, said transferees, James A. Kenyon and Adams service Co., assumed in writing all of the liabilities of said transferor Capitol Chevrolet Company. That among the liabilities so assumed was the liability of said Capitol Chevrolet Company for the negligence hereinabove set forth and the liability of said Capitol

Chevrolet Company to Lawrence Warehouse Company under the above-mentioned Agency Agreement of October 1, 1942. That at the time of said transfer and subsequent thereto transferee Adams Service Co. was a corporation organized and existing under and by virtue of the laws of the State of Nevada. That said Adams Service Co. did not function as a corporation but was wholly controlled by F. Norman Phelps and Alice Phelps for their own personal benefit. That the property of said Adams Service Co. was dealt with by F. Norman Phelps and Alice Phelps as their own.

IX.

That following the transfer of the assets of Capitol Chevrolet Company to its stockholders on December 31, 1943, and the final dissolution of Capitol Chevrolet Company on June 5, 1944, the business of said Capitol Company was continued as a limited partnership, of which James A. Kenyon was the general partner and Adams Service Co. was the limited partner. That on or about the 10th day of April, 1946, cross-defendant Capitol Chevrolet Co., a corporation, was incorporated under the laws of the State of California. That on or about said 10th day of April, 1946, the assets of said Capitol Chevrolet Company, a limited partnership, were transferred to said Capitol Chevrolet Co., a corporation. That on or about said last mentioned date said Capitol Chevrolet Co., a corporation, issued to F. Norman Phelps 213 shares and to Alice Phelps 212 shares of the capital stock of said corporation.

That none of said shares of the capital stock of Capitol Chevrolet Co., a corporation, was issued to Adams Service Co., the limited partner in Capitol Chevrolet Company.

X.

That on the 21st day of November, 1951, plaintiff, Reconstruction Finance Corporation, recovered judgment against cross-claimant, Lawrence Warehouse Company, and cross-defendant Capitol Chevrolet Company in the amount of $42,171.70, plus interest at the rate of 7% per annum from April 15, 1946, to and including said 21st day of November, 1951, and costs in the amount of $20.00.

XI.

That on or about the 1st day of December, 1951, while said judgment was still in force and unsatisfied, cross-claimant, Lawrence Warehouse Company, paid plaintiff, Reconstruction Finance Corporation, the sum of $58,859.90 in full satisfaction and discharge of said judgment in favor of said plaintiff.

XII.

That in the defense of the claims of plaintiff, Defense Supplies Corporation, and of plaintiff, Reconstruction Finance Corporation, cross-claimant Lawrence Warehouse Company incurred in good faith and in the exercise of a reasonable diligence the following costs and expenses each paid upon the date herein specified:

Attorneys' fees:	
January 2, 1948	$ 3,500.00
April 20, 1948	750.00
June 3, 1948	500.00
September 2, 1948	140.00
February 9, 1949	35.00
March 11, 1949	2,500.00
November 16, 1951	315.00
February 7, 1952	275.00
Other costs and expenses:	
December 15, 1947	770.53
December 20, 1947	3.44
February 26, 1948	54.62
March 12, 1948	32.28
April 20, 1948	77.87
May 12, 1948	12.23
August 9, 1948	4.88
November 10, 1948	68.90
December 15, 1948	2.19
March 11, 1949	273.30
May 4, 1949	85.90
June 13, 1949	16.20
October 6, 1950	1.19
March 13, 1951	9.68
April 13, 1951	2.23
June 15, 1951	7.31
August 8, 1951	1.50
	$ 9,439.25

That there should be deducted from said sum of $9,439.25 a refund of $5.00 received by cross-claimant on August 3, 1949, leaving a total net balance of $9,434.25.

XIII.

That it is not true that at the time and place of said fire, cross-claimant, Lawrence Warehouse Company, failed to exercise ordinary care, caution or prudence to avoid said fire or the damages resulting therefrom to plaintiffs or otherwise. That it is not true that said damages, or any thereof, were proximately caused or contributed to by any negligence or failure of said cross-claimant or its agents, guards, or watchmen to exercise ordinary care, caution or prudence to avoid said fire, other than by the failure of said cross-claimant's agent, Capitol Chevrolet Company, so to do.

XIV.

That it is true that the judgment of the above-entitled Court in Civil Action No. 23171 (23171 G) in favor of plaintiff therein became final on or about the 16th day of June, 1949, and untrue that said judgment in said cause became final on or prior to April 15, 1946.

XV.

That it is not true that the evidence and pleadings, including the complaint, cross-claims and answers thereto, or any thereof, other than the complaint of plaintiff and answers of defendants, were merged in the judgment rendered by the above entitled Court in Civil Action No. 23171 (23171 G) rendered on April 15, 1946, or in any other judgment of said Court but it is true that at and before the rendition of its judgment in said cause, said

Court, with the consent of all and without objection from any of the defendants in said cause, reserved jurisdiction to determine the cross-claims filed in said cause and that the same are now pending herein.

XVI.

That it is not true that the evidence and pleadings, including the complaint, cross-claims and answers thereto, or any thereof, other than the complaint of plaintiff and answers of defendants in Civil Action No. 23171 (23171 G) were merged in the findings of fact and conclusions of law rendered in said cause by the above-entitled Court on April 15, 1946, or otherwise or at all, but it is true that said findings of fact and conclusions of law related to and were made solely in connection with the claim of plaintiff and the answers of defendants and not otherwise or at all.

XVII.

That it is not true that cross-claimant, Lawrence Warehouse Company, permitted, directed or authorized the entry onto the premises known as the "Ice Palace" of the persons who used the torch causing the above-mentioned fire which resulted in the destruction of the above-mentioned tires and tubes.

XVIII.

That it is not true that the hazards from fire at the said "Ice Palace" which resulted in the destruction of the above-mentioned tires and tubes were known, consented to, accepted or assumed by cross-claimant, Lawrence Warehouse Company.

XIX.

That it is not true that all of the acts of the cross-defendant Capitol Chevrolet Company in the premises and particularly in connection with the aforesaid circumstances proximately causing said fire and the destruction of said tires and tubes were pursuant to any agreement between said cross-defendant and cross-claimant, Lawrence Warehouse Company, or that the same were, or any of them was, directed or authorized by said cross-claimant.

XX.

That it is not true that at the times mentioned in the cross-claim of Lawrence Warehouse Company cross-defendant Capitol Chevrolet Company had no dominion or control over the Lessors of said "Ice Palace" or over said V. J. McGrew or Charles Elmore.

XXI.

That it is not true that the entry of said Lessors of said "Ice Palace" or V. J. McGrew or Charles Elmore, or any of them, was pursuant or subject to the terms or provisions of said lease between cross-defendant, Capitol Chevrolet Company, Lessee, and Clyde W. Henry and C. Parella, Lessor, dated the 1st day of March, 1943. That it is true that at the time immediately prior to said fire said V. J. McGrew was upon said premises for the purpose of removing pipe and equipment therefrom and not for the purpose of examining or inspecting the same or of making repair or repairs therein or in any part of said "Ice Palace" as said Lessors

Court, with the consent of all and without objection from any of the defendants in said cause, reserved jurisdiction to determine the cross-claims filed in said cause and that the same are now pending herein.

XVI.

That it is not true that the evidence and pleadings, including the complaint, cross-claims and answers thereto, or any thereof, other than the complaint of plaintiff and answers of defendants in Civil Action No. 23171 (23171 G) were merged in the findings of fact and conclusions of law rendered in said cause by the above-entitled Court on April 15, 1946, or otherwise or at all, but it is true that said findings of fact and conclusions of law related to and were made solely in connection with the claim of plaintiff and the answers of defendants and not otherwise or at all.

XVII.

That it is not true that cross-claimant, Lawrence Warehouse Company, permitted, directed or authorized the entry onto the premises known as the "Ice Palace" of the persons who used the torch causing the above-mentioned fire which resulted in the destruction of the above-mentioned tires and tubes.

XVIII.

That it is not true that the hazards from fire at the said "Ice Palace" which resulted in the destruction of the above-mentioned tires and tubes were known, consented to, accepted or assumed by cross-claimant, Lawrence Warehouse Company.

XIX.

That it is not true that all of the acts of the cross-defendant Capitol Chevrolet Company in the premises and particularly in connection with the aforesaid circumstances proximately causing said fire and the destruction of said tires and tubes were pursuant to any agreement between said cross-defendant and cross-claimant, Lawrence Warehouse Company, or that the same were, or any of them was, directed or authorized by said cross-claimant.

XX.

That it is not true that at the times mentioned in the cross-claim of Lawrence Warehouse Company cross-defendant Capitol Chevrolet Company had no dominion or control over the Lessors of said "Ice Palace" or over said V. J. McGrew or Charles Elmore.

XXI.

That it is not true that the entry of said Lessors of said "Ice Palace" or V. J. McGrew or Charles Elmore, or any of them, was pursuant or subject to the terms or provisions of said lease between cross-defendant, Capitol Chevrolet Company, Lessee, and Clyde W. Henry and C. Parella, Lessor, dated the 1st day of March, 1943. That it is true that at the time immediately prior to said fire said V. J. McGrew was upon said premises for the purpose of removing pipe and equipment therefrom and not for the purpose of examining or inspecting the same or of making repair or repairs therein or in any part of said "Ice Palace" as said Lessors

Court, with the consent of all and without objection from any of the defendants in said cause, reserved jurisdiction to determine the cross-claims filed in said cause and that the same are now pending herein.

XVI.

That it is not true that the evidence and pleadings, including the complaint, cross-claims and answers thereto, or any thereof, other than the complaint of plaintiff and answers of defendants in Civil Action No. 23171 (23171 G) were merged in the findings of fact and conclusions of law rendered in said cause by the above-entitled Court on April 15, 1946, or otherwise or at all, but it is true that said findings of fact and conclusions of law related to and were made solely in connection with the claim of plaintiff and the answers of defendants and not otherwise or at all.

XVII.

That it is not true that cross-claimant, Lawrence Warehouse Company, permitted, directed or authorized the entry onto the premises known as the "Ice Palace" of the persons who used the torch causing the above-mentioned fire which resulted in the destruction of the above-mentioned tires and tubes.

XVIII.

That it is not true that the hazards from fire at the said "Ice Palace" which resulted in the destruction of the above-mentioned tires and tubes were known, consented to, accepted or assumed by cross-claimant, Lawrence Warehouse Company.

XIX.

That it is not true that all of the acts of the cross-defendant Capitol Chevrolet Company in the premises and particularly in connection with the aforesaid circumstances proximately causing said fire and the destruction of said tires and tubes were pursuant to any agreement between said cross-defendant and cross-claimant, Lawrence Warehouse Company, or that the same were, or any of them was, directed or authorized by said cross-claimant.

XX.

That it is not true that at the times mentioned in the cross-claim of Lawrence Warehouse Company cross-defendant Capitol Chevrolet Company had no dominion or control over the Lessors of said "Ice Palace" or over said V. J. McGrew or Charles Elmore.

XXI.

That it is not true that the entry of said Lessors of said "Ice Palace" or V. J. McGrew or Charles Elmore, or any of them, was pursuant or subject to the terms or provisions of said lease between cross-defendant, Capitol Chevrolet Company, Lessee, and Clyde W. Henry and C. Parella, Lessor, dated the 1st day of March, 1943. That it is true that at the time immediately prior to said fire said V. J. McGrew was upon said premises for the purpose of removing pipe and equipment therefrom and not for the purpose of examining or inspecting the same or of making repair or repairs therein or in any part of said "Ice Palace" as said Lessors

deemed necessary in connection with said premises and building.

XXII.

That it is not true that cross-claimant, Lawrence Warehouse Company, was equally, jointly or contributorily negligent in any way with cross-defendants, Capitol Chevrolet Company and V. J. McGrew, or either of them, in causing the damage for which judgment was rendered in Civil Action No. 23171 (23171 G).

XXIII.

That it is not true that cross-claimant, Lawrence Warehouse Company, had knowledge of, acquiesced in, directed, authorized or consented to any negligence of cross-defendant Capitol Chevrolet Company which caused or contributed to the cause of the damage for which judgment was rendered in said cause, Civil Action 23171 (23171 G).

The Court makes the following Conclusions of Law from the foregoing Findings of Fact:

Conclusions of Law

I.

The motion of cross-defendant Capitol Chevrolet Company to dismiss the cross-claim of cross-claimant Lawrence Warehouse Company in Civil Action No. 23171 (23171 G) should be denied and cross-claimant Lawrence Warehouse Company is entitled to judgment in No. 23171 in its favor against said cross-defendant in the principal sum of $68,294.15, arrived at as follows:

December 1, 1951	$58,859.90
January 2, 1948	3,500.00
April 20, 1948	750.00
June 3, 1948	500.00
September 2, 1948	140.00
February 9, 1949	35.00
March 11, 1949	2,500.00
November 16, 1951	315.00
February 7, 1952	275.00
December 15, 1947	770.53
December 20, 1947	3.44
February 26, 1948	54.62
March 12, 1948	32.28
April 20, 1948	77.87
May 12, 1948	12.23
August 9, 1948	4.88
November 10, 1948	68.90
December 15, 1948	2.19
March 11, 1949	273.30
May 4, 1949	85.90
June 13, 1949	16.20
October 16, 1950	1.19
March 13, 1951	9.68
April 13, 1951	2.23
June 15, 1951	7.31
August 8, 1951	1.50
	68,299.15
August 3, 1949 Refund	5.00
	$68,294.15

together with interest on the above items at the rate of seven per cent (7%) per annum from the dates specified above to the date of entry of judgment, together with its costs of suit in said action incurred.

II.

The motion of cross-defendants James A. Kenyon, Adams Service Co., F. Norman Phelps and Alice Phelps to dismiss the cross-claim of Lawrence Warehouse Company in Civil Action No. 30473 and to strike evidence should be and is denied, and cross-claimant Lawrence Warehouse Company is entitled to Judgment in No. 30473 in its favor against said cross-defendants, jointly and severally, in the principal amount, together with interest thereon to the date of entry of judgment as in Conclusion of Law I hereinabove set forth and together with its costs of suit in said Civil Action 30473.

III.

Capitol Chevrolet Company having been long since dissolved when the cross-claim of Lawrence Warehouse Company against it in No. 30473 was filed, that action against it should be dismissed.

IV.

Capitol Chevrolet Co. and J. A. K. Co., not having assumed any of the liabilities of the Capitol Chevrolet Company or of its successors, are not liable for the obligations of Capitol Chevrolet Company and the action in No. 30473 against them should be dismissed.

Dated: February 11th, 1933.
/s/ LOUIS E. GOODMAN,
United States District Judge.

[Endorsed]: Filed Feb. 11, 1953.

In the United States District Court for the Northern District of California, Southern Division

No. 23171-G

DEFENSE SUPPLIES CORPORATION, Plaintiff,

vs.

LAWRENCE WAREHOUSE COMPANY, a corporation, et al., Defendants.

LAWRENCE WAREHOUSE COMPANY, a corporation, Cross-claimant,

vs.

CLYDE W. HENRY, CONSTANTINE PARELLA and CAPITOL CHEVROLET COMPANY, a corporation, Cross-Defendants.

No. 30473

RECONSTRUCTION FINANCE CORPORATION, Plaintiff,

vs.

CAPITOL CHEVROLET COMPANY, et al., Defendants.

JUDGMENT

The above entitled consolidated actions came on regularly for trial of cross-claims on the 6th day

of March, 1952, before the Court sitting without a jury, Maynard Garrison, Esq., John R. Pascoe, Esq., and Wallace, Garrison, Norton & Ray appearing for cross claimant Lawrence Warehouse Company, and James B. Isaacs, Esq. and Dempsey, Thayer, Deibert & Kumler and Herbert W. Clark, Esq., Richard J. Archer, Esq. and Morrison, Hohfeld, Foerster, Shuman & Clark appearing for cross-defendants Capitol Chevrolet Company, James A. Kenyon, Capitol Chevrolet Co., Adams Service Co., J. A. K. Co., F. Norman Phelps and Alice Phelps.

Evidence having been introduced, the cause having been submitted to the Court for consideration and decision and the Court having made and filed its Findings of Fact and Conclusions of Law therein;

Now, Therefore, it is Ordered, Adjudged and Decreed:

1. That cross-claimant Lawrence Warehouse Company do have and recover from cross-defendant Capitol Chevrolet Company on account of its cross-claim in action numbered 23171, the principal sum of $68,294.15, together with interest thereon in the amount of $7,975.58, or a total sum of $76,269.73.

2. That cross-claimant Lawrence Warehouse Company do have and recover from James A. Kenyon, Adams Service Co., F. Norman Phelps and Alice Phelps, jointly and severally, on account of its cross-claims in action numbered 30473, the principal sum of $68,294.15 together with interest thereon in the amount of $7,975.58 or the total sum of $76,-

269.73, together with said cross-claimant's taxable costs and disbursements incurred in said action in the amount of $.....

3. That the cross-claims of cross-claimant Lawrence Warehouse Company against Capitol Chevrolet Company, Capitol Chevrolet Co. and J. A. K. Co. in action numbered 30473 be and the same are hereby dismissed, and that Capitol Chevrolet Company, Capitol Chevrolet Co. and J. A. K. Co. do have and recover against cross-claimant Lawrence Warehouse Company their several taxable costs and disbursements in said action in the following amounts:

Capitol Chevrolet Company	$.....
Capitol Chevrolet Co.	$.....
J. A. K. Co.	$.....

Dated: February 11th, 1953.

/s/ LOUIS E. GOODMAN,
United States District Judge.

Not approved as to form this 29th day of January, 1953, because a separate judgment should be rendered, entered and filed in each of the above numbered actions and because, further,

So far as we are aware Adams Service Co. was not and is not a party to other action.

HERBERT W. CLARK,
RICHARD J. ARCHER,
MORRISON, HOHFELD,
FOERSTER, SHUMAN & CLARK

JAMES B. ISAACS,
DEMPSEY, THAYER, DIEBERT
& KUMLER,
/s/ By HERBERT W. CLARK,
Attorneys for Cross-defendants Capitol Chevrolet Company, James A. Kenyon, Capitol Chevrolet Co., Adams Service Co., J. A. K. Co., F. Norman Phelps and Alice Phelps.

Entered in Civil Docket Feb. 12, 1953.

MEMORANDUM OF COURT UPON SIGNING OF JUDGMENT

The attorneys for the cross-defendants have objected to the form of judgment as entered on the ground that no valid judgment can be rendered against the Adams Service Company, a Nevada corporation, because it was never served and never formerly appeared in this action.

Summons running to Adams Service Company, as well as to F. Norman Phelps and Alice Phelps, was personally served by the Marshal upon F. Norman Phelps and Alice Phelps. F. Norman Phelps and Alice Phelps were the sole stockholders and officers of the Adams Service Company. This corporation was employed by them solely for their own personal benefit. They dealt with its property as their own. It may be fairly said that the Phelps were the corporation. The marshal's return stated merely that summons had been served upon F. Norman Phelps and Alice Phelps. It did not state that they had been served in their capacity as officers

of the Adams Service Company. But, failure to make proof of service does not affect the validity of the service. Rule 4(g), F.R.C.P. Valid service may be made upon a foreign corporation by delivering a copy of the summons and of the complaint to an officer of the corporation. Rule 4(d) (3) F.R.C.P. Despite the fact that the marshal's return did not recite that the Phelps had been served as officers of the Adams Service Company, service upon them constituted valid service upon the corporation. Woodworkers Tool Works vs. Byrne, 191 F.2d 667 (9 Cir. 1951); M. Lowenstein & Sons vs. American Underwear Mfg. Co., 11 F.R.D. 172 (E.D.Pa.1951); Szabo vs. Keeshin Motor Express 10 F.R.D. 275 (N.D. Ohio 1950).

No pleading was filed in this action in behalf of Adams Service Company. But, prior to trial, the attorneys for the cross-defendants acknowledged receipt of a notice and order for the taking of depositions by affixing their signature as attorneys for cross-defendants when the cross-defendants named in the caption of the notice and order included Adams Service Company. In their written brief after trial these attorneys represented themselves as attorneys for Adams Service Company and argued against the liability of the corporation on the merits. A stipulation extending the time in which the cross-claimant might file a reply brief was signed by these attorneys as attorneys for the cross-defendants, the named cross-defendants including Adams Service Company. These attorneys filed in behalf of Adams Service Company pro-

posed amendments to the first proposed findings of fact and conclusions of law submitted by cross-claimant. These proposed amendments did not seek to eliminate the finding and conclusion of liability on the part of Adams Service Company. Upon the submission by cross-claimant of second proposed findings of fact and conclusions of law wherein the liability of Adams Service Company was again set forth no objection was made. It was not until a proposed judgment was submitted by cross-claimant that the attorneys for the cross-defendants objected that Adams Service Company was not a party to the action.

These activities of the attorneys for the cross-defendants, by which the court and all concerned were led to believe that Adams Service Company sought to defend itself on the merits constituted a binding appearance. Adams Service Company is a party to this action because it was validly served and appeared. The contention of its attorneys to the contrary at this stage of the proceedings is frivolous.

Dated: February 11, 1953.

/s/ LOUIS E. GOODMAN,
United States District Judge.

[Endorsed]: Filed Feb. 11, 1953.

[Title of District Court and Cause No. 30473.]

RETURN ON SERVICE OF WRIT

I hereby certify and return, that on the 16th day of February, 1952, I received the within summons and served F. Norman Phelps, personally, at 5117 Proctor, Oakland, Calif., on 2-16-52; also served Alice Phelps, by serving F. Norman Phelps, husband, at 5117 Proctor, Oakland, on 2-16-52.

Marshal's fees: Travel, $3.40; Service, $4.00; Total, $7.40.

JOHN A. ROSEEN,
United States Marshal,
/s/ By THOS. P. W. GOWAN,
Deputy United Sates Marshal.

[Endorsed]: Filed Feb. 18, 1952.

[Title of District Court and Cause No. 30473.]

NOTICE OF TIME AND PLACE OF TAKING DEPOSITION

To Cross-Defendants above named and to James B. Isaacs, Esq., Messrs. Dempsey, Thayer, Deibert & Kumler, Herbert W. Clark, Esq., Richard J. Archer, Esq., Morrison, Hohfeld, Foerster, Shuman & Clark, their attorneys:

You and each of you will please take notice that the deposition of Alice Phelps will be taken on behalf of Cross-Claimant on February 25, 1952, at 10:00 o'clock a.m., at the office of Paul F. St. Sure,

Attorney at Law, 1415 Financial Center Building, Oakland, California.

W. R. WALLACE, JR.,
MAYNARD GARRISON,
JOHN R. PASCOE,
WALLACE, GARRISON, NORTON & RAY,
/s/ By JOHN R. PASCOE,
Attorneys for Cross-Claimant Lawrence Warehouse Company.

Acknowledgment of Service attached.

[Endorsed]: Filed Feb. 19, 1952.

[Title of District Court and Cause No. 30473.]

ANSWER TO AMENDMENT TO CROSS-CLAIM OF LAWRENCE WAREHOUSE COMPANY

Comes now each of the cross-defendants, Capitol Chevrolet Company, a corporation, James A. Kenyon, and Capitol Chevrolet Co., a corporation, and severally and not jointly answers the Amendment to Cross-Claim of Lawrence Warehouse Company, a corporation, on file herein as follows:

I.

Answering paragraph I of said Amendment to Cross-Claim (being an amendment to paragraph III of said Cross-Claim), said cross-defendants admit that from and after October 1, 1942, Adams

Service Co. was, and still is, a corporation organized and existing under and by virtue of the laws of the State of Nevada. Said cross-defendants allege that from April 9, 1943, to some time between July 15, 1944, and March 31, 1946, the shares of stock of Adams Service Co. were all owned by Alice Phelps; that some time after July 15, 1944, and before March 31, 1946, F. Norman Phelps acquired all the shares of stock of Alice Phelps in Adams Service Co. Said cross-defendants further allege that from and after November, 1943, J. A. K. Co. (formerly Adams Service Company) was, and still is, a corporation organized and existing under and by virtue of the laws of the State of Nevada; that some time after July 15, 1944, and before March 31, 1946, James A. Kenyon became the sole stockholder of J. A. K. Co. Except as in this answering paragraph admitted, said cross-defendants deny the averments of said paragraph I.

II.

Answering paragraph II of said Amendment to Cross-Claim (being an amendment to paragraph VI of said Cross-Claim), said cross-defendants deny that James A. Kenyon and Adams Service Co. transferred to cross-defendant Capitol Chevrolet Co. all the property and assets which James A. Kenyon and Adams Service Co. had received upon the dissolution of Capitol Chevrolet Company; they deny that Adams Service Co. transferred any assets to Capitol Chevrolet Co.; they deny that Capitol Chevrolet Co. assumed and agreed to pay the liabilities

of cross-defendant Capitol Chevrolet Company, the liabilities of James A. Kenyon or Adams Service Co. to cross-claimant or to any person or corporation whatsoever, or any other liabilities. They deny that Capitol Chevrolet Company was at any time, or is now, liable or indebted to cross-claimant in any sum whatsoever. Except as in this answering paragraph denied, said cross-defendants admit the averments of paragraph II.

Dated: San Francisco, February 25, 1952.

/s/ JAMES B. ISAACS,
/s/ DEMPSEY, THAYER, DEIBERT & KUMLER,
/s/ HERBERT W. CLARK,
/s/ RICHARD J. ARCHER,
/s/ MORRISON, HOHFELD, FOERSTER, SHUMAN & CLARK,

Attorneys for Cross-Defendants Capitol Chevrolet Company, James A. Kenyon and Capitol Chevrolet Co.

Acknowledgment of Service attached.

[Endorsed]: Filed Feb. 25, 1952.

[Title of District Court and Cause No. 30473.]

MOTION OF CROSS-DEFENDANTS TO DISMISS WITH PREJUDICE THE CROSS-CLAIM OF LAWRENCE WAREHOUSE COMPANY

Comes now each of the cross-defendants Capitol Chevrolet Company, James A. Kenyon, Capitol Chevrolet Co., F. Norman Phelps and Alice Phelps and each of said cross-defendants, severally, moves the above-styled Court to dismiss with prejudice the cross-claim of Lawrence Warehouse Company on the grounds that said cross-claim fails to state a claim upon which relief can be granted and that it affirmatively appears from said cross-claim and from the facts of which the Court takes judicial notice that cross-claimant Lawrence Warehouse Company is not entitled to any relief.

Dated: San Francisco, March 5, 1952.

/s/ JAMES B. ISAACS,

/s/ DEMPSEY, THAYER, DEIBERT & KUMLER,

/s/ HERBERT W. CLARK,

/s/ RICHARD J. ARCHER,

/s/ MORRISON, HOHFELD, FOERSTER, SHUMAN & CLARK,

Attorneys for Cross-Defendants Capitol Chevrolet Company, James A. Kenyon, Capitol Chevrolet Co., F. Norman Phelps and Alice Phelps.

MEMORANDUM OF POINTS AND AUTHORITIES

I.

The Judgment in No. 23171-G Unambiguously and Conclusively Establishes that both Lawrence Warehouse Company and Capitol Chevrolet Company were, as between themselves, Primary, Joint and Concurrently Tort-feasors.

A. The Judgment in No. 23171-G provides, in part, as follows:

"Now, Therefore, It Is Ordered, Adjudged and Decreed that Defense Supplies Corporation, the plaintiff herein, do have and recover from defendants Lawrence Warehouse Company, a corporation, Capitol Chevrolet Company, a corporation, and V. J. McGrew, jointly and severally, the sum of $41,975.15, together with plaintiff's costs and disbursements incurred in this action, amounting to the sum of $196.55."

(Emphasis added.)

B. A joint judgment against tort-feasors can be rendered only if the tort-feasors are each primarily liable for the tort.

Adams v. White Bus Line, 184 Cal. 710, at 713,714, 195 Pac. 389 (1921);

Betcher v. McChesney, 255 Pa. 394, 100 Atl. 124 (1917).

II.

The Findings of Fact and Conclusions of Law in No. 23171-G Unambiguously and Conclusively Establish that Lawrence Warehouse Company was held Liable for its own Negligent Acts and that

Lawrence Warehouse Company and Capitol Chevrolet Company were Joint and Concurrent Tortfeasors.

A. The findings and conclusions state, in part, as follows:

"V.

"On April 9, 1943, defendants Lawrence Warehouse Company and Capitol Chevrolet Company failed and omitted to exercise reasonable care and diligence for the protection and preservation of said goods so deposited and stored by plaintiff in this, that said defendants negligently permitted the use of said torch on said premises and negligently failed and omitted to see that it was used in a careful manner, and to provide adequate protection for said premises and said goods against the use of said torch, and maintained said premises and said goods in a negligent and careless manner so as to permit them to become ignited and destroyed by fire. By reason of such negligence and carelessness said premises and plaintiff's said goods were consumed and totally destroyed by fire."

"VI.

"The negligence of defendants V. J. McGrew, Lawrence Warehouse Company, and Capitol Chevrolet Company concurred and joined together to destroy plaintiff's goods, as aforesaid."

B. The specific finding that Lawrence Warehouse Company performed certain negligent acts which caused damage to plaintiff conclusively es-

tablishes that Lawrence Warehouse Company was a joint tort-feasor and primarily negligent.

Salter v. Lomardi, 116 C. A. 602, at 604, 3 P. 2d 38 (1931).

C. The specific conclusion that the negligence of Lawrence Warehouse Company and Capitol Chevrolet Company concurred and joined together to destroy plaintiff's goods precludes the possibility that Lawrence Warehouse Company was held liable on a theory of respondeat superior.

Salter v. Lombardi, 116 C. A. 602, at 604, 3 P. 2d 38 (1931).

1. Where a principal is held liable solely for the tort of an agent, the principal and agent are not joint tort-feasors as the law employs that term.

Bradley v. Rosenthal, 154 Cal. 420, at 423, 97 Pac. 875 (1908);

Fimple v. Southern Pacific Co., 38 C. A. 727, 177 Pac. 871 (1918).

III.

Neither the judgment nor the Findings of Fact and Conclusions of Law in No. 23171-G can be Contradicted or "Explained" by Extrinsic Evidence.

Rothschild & Co. v. Marshall, 44 F. 2d 546 (9th Cir. 1930);

Moore v. Harjo, 144 F. 2d 318 (10th Cir. 1944).

B. The language of a judicial record may not be contradicted by extrinsic evidence that something different was intended; the principle of integration is especially applicable to judicial orders.

In re Crosby Stores, 65 F. 2d 360, at 361 (2d Cir. 1933);

Louisiana Land & Exp. Co. v. Parish of Jefferson, 59 F. Supp. 260, at 266 E. D. La. 1945);

Barnsdall Refining Corporation v. Birnamwood Oil Co., 32 F. Supp. 308 (E. D. Wis. 1940);

Builders Supply Co v. McCabe, 366 Pa. 322, 77 A. 2d 368 (1951), and cases there cited.

IV.

According to the Law of California, Lawrence Warehouse Company is Estopped by the Judgment in No. 23171-G in Favor of Defense Supplies Corporation from Denying that its own Primary Negligence Contributed to the Damage to Defense Supplies Corporation.

A. Only three questions are pertinent in determining the validity of a plea of res judicata: (1) Was the issue decided in the prior adjudication identical with the one presented in the action in question? (2) Was there a final judgment on the merits? (3) Was the party against whom the plea is asserted a party or in privity with a party to the prior adjudication.

Bernhard v. Bank of America, 19 Cal. 2d 807, 122 P. 2d 892 (1942).

B. The question of whether Lawrence Warehouse Company was itself negligent and primarily liable to Defense Supplies Corporation was in issue in No. 23171-G because: (1) The judgment, findings and conclusions so state. (2) The cross-claim

of Lawrence Warehouse Company was also pleaded by way of answer and avoidance to the claim of Defense Supplies Corporation.

1. The answer and cross-claim of Lawrence Warehouse Company reads, in part, as follows:

"And for a further and separate answer and by way of cross-claim against the defendants Clyde W. Henry, Constantine Parella and Capitol Chevrolet Company, this defendant and cross-claimant avers as follows:"

2. Defense Supplies Corporation averred the joint and concurrent negligence of Lawrence Warehouse Company and Capitol Chevrolet Company in the same language which the Court used in finding and concluding that Lawrence Warehouse Company and Capitol Chevrolet Company were joint and concurrent tort-feasors (Complaint, Pars. III and IV of Fourth Cause of Action).

3. As a matter of law, the question of primary or secondary liability is in issue in every case where one of several defendants in a tort action raises the defense that his liability is based solely on the tort of another.

Bradley v. Rosenthal, 154 Cal. 420, 97 Pac. 875 (1908);

Salter v. Lombardi, 116 C. A. 602, at 604, 3 P. 2d 38 (1931).

IV.

According to the Law of California there is no

Right to Contribution or Indemnity Between Joint Tort-feasors.

Dow v. Sunset Tel. & Tel. Co., 162 Cal. 136, 121 Pac. 379 (1912);

Adams v. White Bus Line, 184 Cal. 710, 195 Pac. 389 (1921).

V.

By the Agreement, Exhibit A to the Complaint, Capitol Chevrolet Company Agreed to Indemnify Lawrence Warehouse Company only for the Failure of Capitol Chevrolet Company to Perform its own Duties.

A. Paragraph 8 of the Agreement provides:

"To indemnify the Principal [Lawrence Warehouse Company] against loss or damage resulting from a failure on the part of the Agent [Capitol Chevrolet Company] to perform any of the duties or obligations above set forth."

[Endorsed]: Filed March 5, 1952.

[Title of District Court and Cause No. 30473.]

ANSWER TO CROSS-COMPLAINT OF LAWRENCE WAREHOUSE COMPANY BY F. NORMAN PHELPS AND ALICE PHELPS

Comes now each of the cross-defendants, F. Norman Phelps and Alice Phelps, and, severally and not jointly, answers severally each of the two cross-claims averred in the cross-complaint of Lawrence Warehouse Company, a corporation, on file herein, as follows:

As and for a First Defense to the First Cross-Claim averred in the cross-complaint of Lawrence Warehouse Company, a corporation, on file herein, each of said cross-defendants, severally and not jointly, admits, denies and avers as follows:

I.

Cross-defendants deny the averments of paragraph II.

II.

Cross-defendants admit the averments of paragraphs I and III.

III.

Answering paragraph IV, cross-defendants deny that the judgment in Civil Action No. 23171-G in the United States District Court for the Northern District of California became final on or about June 16, 1949, or at any time after April 15, 1946. Except as in this paragraph denied, defendants admit the averments of paragraph IV.

IV.

Answering paragraph V, cross-defendants state that they are without knowledge or information sufficient to form a belief as to the truth of the averments in said paragraph that cross-claimant has paid the sum of $7,425.00 by way of attorneys' fees and the sum of $1,410.44 by way of costs and out-of-pocket expense in defending said Civil Action No. 23171-G and will incur further attorneys' fees, costs and expenses in defending this action. They deny the remaining averments of paragraph V.

V.

Answering paragraph VI, cross-defendants admit that on or about May 31, 1943, James A. Kenyon and Adams Service Co. agreed that upon the transfer to them of the assets of Capitol Chevrolet Company they would assume and agree to pay all the debts, liabilities and obligations of said Capitol Chevrolet Company. Except as in this paragraph admitted, they deny the averments of paragraph VI.

VI.

Answering paragraph VII, cross-defendants admit the averments of the first sentence in said paragraph, and they deny the remaining averments of said paragraph.

As and for a Second Defense to the First Cross-Claim averred in the cross-complaint of Lawrence Warehouse Company, a corporation, on file herein, each of said cross-defendants, severally and not jointly, avers as follows:

I.

The first cross-claim fails to state facts sufficient to state a claim against cross-defendants, or any of them, upon which relief can be granted.

As and for a Third Defense to the First Cross-Claim averred in the cross-complaint of Lawrence Warehouse Company, a corporation, on file herein, each of said cross-defendants, severally and not jointly, avers as follows:

I.

Said cross-claim is barred by subsection 3 of sec-

tion 341 of the California Code of Civil Procedure, and the claims therein set forth did not accrue within six months next before the commencement of this action.

As and for a Fourth Defense to the First Cross-Claim averred in the cross-complaint of Lawrence Warehouse Company, a corporation, on file herein, each of said cross-defendants, severally and not jointly, avers as follows:

I.

Said cross-claim is barred by subsection 1 of section 339 of the California Code of Civil Procedure, and the claims therein set forth did not accrue within two years next before the commencement of this action.

As and for a Fifth Defense to the First Cross-Claim averred in the cross-complaint of Lawrence Warehouse Company, a corporation, on file herein, each of said cross-defendants, severally and not jointly, avers as follows:

I.

Said cross-claim is barred by subsection 4 of section 338 of the California Code of Civil Procedure, and the claims therein set forth did not accrue within three years next before the commencement of this action.

As and for a Sixth Defense to the First Cross-Claim averred in the cross-complaint of Lawrence Warehouse Company, a corporation, on file herein, each of said cross-defendants, severally and not jointly, avers as follows:

I.

Said cross-claim is barred by subsection 1 of section 337 of the California Code of Civil Procedure, and the claims therein set forth did not accrue within four years next before the commencement of this action.

As and for a Seventh Defense to the First Cross-Claim averred in the cross-complaint of Lawrence Warehouse Company, a corporation, on file herein, each of said cross-defendants, severally and not jointly, avers as follows:

I.

Said cross-claim is barred by section 343 of the California Code of Civil Procedure, and the claims therein set forth did not accrue within four years next before the commencement of this action.

As and for an Eighth Defense to the First Cross-Claim averred in the cross-complaint of Lawrence Warehouse Company, a corporation, on file herein, each of said cross-defendants, severally and not jointly, avers as follows:

I.

Said cross-claim is barred by subsection 1 of section 336 of the California Code of Civil Procedure, and the claims therein set forth did not accrue within five years next before the commencement of this action.

As and for a Ninth Defense to the First Cross-Claim averred in the cross-complaint of Lawrence Warehouse Company, a corporation, on file herein,

each of said cross-defendants, severally and not jointly, avers as follows:

I.

In said Civil Action No. 23171-G in the United States District Court for the Northern District of California, it was ordered, adjudged and decreed that Defense Supplies Corporation, the plaintiff therein, have and recover from defendants therein Lawrence Warehouse Company, a corporation, and cross-claimant herein, Capitol Chevrolet Company, a corporation, and one of the cross-defendants herein, and V. J. McGrew, jointly and severally, the sum of $41,975.15, together with plaintiff's costs and disbursements in said action.

II.

In said Civil Action No. 23171-G in the United States District Court for the Northern District of California, the Court found that said Lawrence Warehouse Company failed and omitted to exercise reasonable care and diligence for the protection and preservation of goods of plaintiff therein, and said Court further found that the negligence of defendants in said action, V. J. McGrew, said Lawrence Warehouse Company and said Capitol Chevrolet Company, concurred and joined together.

As and for a Tenth Defense to the First Cross-Claim averred in the cross-complaint of Lawrence Warehouse Company, a corporation, on file herein, each of said cross-defendants, severally and not jointly, avers as follows:

I.

Cross-claimant Lawrence Warehouse Company

was equally, jointly and contributorily negligent, or negligent in any of said ways, with cross-defendant Capitol Chevrolet Company, in causing the damage for which judgment was rendered in Civil Action No. 23171-G in the United States District Court for the Northern District of California, if said Capitol Chevrolet Company were negligent at all or if any negligence of said Capitol Chevrolet Company caused or contributed to the cause of said damage.

II.

Cross-claimant Lawrence Warehouse Company had knowledge of, acquiesced in, and consented to any negligence, if any there were, of said Capitol Chevrolet Company which caused or contributed to the cause of the damage for which judgment was rendered in said Civil Action No. 23171-G.

As and for an Eleventh Defense to the First Cross-Claim averred in the cross-complaint of Lawrence Warehouse Company, a corporation, on file herein, each of said cross-defendants, severally and not jointly, avers as follows:

I.

The claims of cross-claimant Lawrence Warehouse Company set forth in this action were set forth in Civil Action No. 23171-G in the United States District Court for the Northern District of California by cross-claimant herein Lawrence Warehouse Company against cross-defendant herein Capitol Chevrolet Company, and final judgment has been rendered in said Civil Action No. 23171-G barring said Lawrence Warehouse Company from reassserting said claims in this action, or at all.

As and for a First Defense to the Second Cross-Claim averred in the cross-complaint of Lawrence Warehouse Company, a corporation, on file herein, each of said cross-defendants, severally and not jointly, admits, denies and avers as follows:

I.

Cross-defendants admit the averments in paragraph II.

II.

Cross-defendants reaver, incorporate, and make a part hereof as though fully set forth herein, paragraphs I, II, III, V and VI of their First Defense to the First Cross-Claim.

III.

Answering paragraph III, cross-defendants admit that on or about October 1, 1942, Capitol Chevrolet Company entered into a written contract with cross-claimant Lawrence Warehouse Company, a copy of which is Exhibit A attached to the answer and cross-claim herein of said Lawrence Warehouse Company. Cross-defendants state that -they are without knowledge or information sufficient to form a belief as to the truth of the averments in said paragraph that cross-claimant has paid the sum of $7,425.00 by way of attorneys' fees and the sum of $1,410.44 by way of costs and out-of-pocket expenses in defending Civil Action No. 23171-G in the United States District Court for the Northern District of California and will incur further attorneys' fees, costs and out-of-pocket expenses in defending this action. Except as herein admitted they deny the remaining averments of paragraph III.

As and for Second, Third, Fourth, Fifth, Sixth, Seventh, Eighth, Ninth, Tenth and Eleventh Defenses to the Second Cross-Claim averred in the cross-complaint of Lawrence Warehouse Company, a corporation, on file herein, each of said cross-defendants, severally and not jointly, reavers, incorporates and makes a part hereof as though fully set forth herein, the averments in their Second, Third, Fourth, Fifth, Sixth, Seventh, Eighth, Ninth, Tenth and Eleventh Defenses to the First Cross-Claim.

Wherefore, cross-defendants F. Norman Phelps and Alice Phelps pray that cross-claimant Lawrence Warehouse Company take nothing by this action and that cross-defendants be awarded their costs of suit herein incurred.

Dated: San Francisco, March 5, 1952.

/s/ JAMES B. ISAACS
/s/ DEMPSEY, THAYER, DEIBERT & KUMLER
/s/ HERBERT W. CLARK
/s/ RICHARD J. ARCHER
/s/ MORRISON, HOHFELD, FOERSTER, SHUMAN & CLARK

Attorneys for Cross-Defendants Capitol Chevrolet Company, James A. Kenyon and Capitol Chevrolet Co.

Acknowledgment of Service attached.

[Endorsed]: Filed March 5, 1952.

[Title of District Court and Cause No. 30473.]

ANSWER TO AMENDMENT TO CROSS-CLAIM OF LAWRENCE WAREHOUSE COMPANY BY F. NORMAN PHELPS AND ALICE PHELPS

Comes now each of the cross-defendants F. Norman Phelps and Alice Phelps, and severally and not jointly, answers the Amendment to Cross-Claim of Lawrence Warehouse Company, a corporation, on file herein, as follows:

I.

Answering paragraph I of said Amendment to Cross-Claim (being an amendment to paragraph III of said Cross-Claim), said cross-defendants admit that from and after October 1, 1942, Adams Service Co. was, and still is, a corporation organized and existing under and by virtue of the laws of the State of Nevada. Said cross-defendants allege that from April 9, 1943, to sometime between July 15, 1944, and March 31, 1946, the shares of stock of Adams Service Co. were all owned by Alice Phelps; that sometime after July 15, 1944, and before March 31, 1946, F. Norman Phelps acquired the interest of Adams Service Co. in Capitol Chevrolet Co., a partnership. Said cross-defendants further allege that from and after November, 1943, to on or about July 25, 1950, J. A. K. Co. (formerly Adams Serv-

ice Company), was a corporation organized and existing under and by virtue of the laws of the State of Nevada; that sometime after July 15, 1944, and before March 31, 1946, James A. Kenyon became the sole stockholder of J. A. K. Co. Except as in this answering paragraph admitted, said cross-defendants deny the averments of said paragraph I.

II.

Answering paragraph II of said Amendment to Cross-Claim (being an amendment to paragraph VI of said Cross-Claim), said cross-defendants deny that James A. Kenyon and Adams Service Co. transferred to cross-defendant Capitol Chevrolet Co. all the property and assets which James A. Kenyon and Adams Service Co. had received upon the dissolution of Capitol Chevrolet Company; they deny that Adams Service Co. transferred any assets to Capitol Chevrolet Co.; they deny that Capitol Chevrolet Co. assumed and agreed to pay the liabilities of cross-defendant Capitol Chevrolet Company, the liabilities of James A. Kenyon or Adams Service Co. to cross-claimant or to any person or corporation whatsoever, or any other liabilities. They deny that Capitol Chevrolet Company was at any time, or is now, liable or indebted to cross-claimant in any sum whatsoever. Except as in this answering paragraph denied, said cross-defendants admit the averments of paragraph II.

Dated: San Francisco, March 5, 1952.

/s/ JAMES B. ISAACS
/s/ DEMPSEY, THAYER, DEIBERT & KUMLER
/s/ HERBERT W. CLARK
/s/ RICHARD J. ARCHER
/s/ MORRISON, HOHFELD, FOERSTER, SHUMAN & CLARK

Attorneys for Cross-Defendants F. Norman Phelps and Alice Phelps.

[Endorsed]: Filed March 5, 1952.

[Title of District Court and Cause No. 30473.]

ANSWER TO INTERROGATORIES PROPOUNDED BY CROSS-CLAIMANT LAWRENCE WAREHOUSE COMPANY TO CROSS-DEFENDANT JAMES A. KENYON

Pursuant to Rule 33 of the Federal Rules of Civil Procedure, Cross-Defendant James A. Kenyon hereby submits the following answers to interrogatories propounded by Cross-Claimant Lawrence Warehouse Company, dated November 28, 1951:

1. I was a stockholder of Capitol Chevrolet Company at all times between October 1, 1942, and June 5, 1944. During this period I owned 325 shares of the 650 shares outstanding.

2. I was a director of Capitol Chevrolet Company at all times between October 1, 1942, and June 5, 1944.

3. I was an officer of Capitol Chevrolet Company at all times between October 1, 1942, and June 5, 1944, serving as President of the corporation.

4. One-half of all the assets of the Capitol Chevrolet Company were distributed to me prior to the filing of the Certificate of Winding Up and Dissolution on June 5, 1944. These assets were immediately transferred to me into the Capitol Chevrolet Co., a limited partnership.

5. The stockholders assumed and agreed to pay all the debts, liabilities and obligations of the said corporation.

6. The assumption referred to in Interrogatory No. 5 was a general assumption and would cover the liability, if any, referred to in Interrogatory No. 6.

7. The assumption referred to in Interrogatory No. 5 was a general assumption and would cover the liability, if any, referred to in Interrogatory No. 7.

8. The assumption referred to in Interrogatory No. 5 was made in writing when the shareholders ratified and approved the resolution adopted at the special meeting of the Board of Directors and assumed the obligation. I do not know where the original is located. A copy of the assumption, taken from my personal files, is attached hereto and marked "Exhibit A".

9. The only assumption made is that described

in the general assumption marked "Exhibit A" and attached hereto.

10. The only assumption made is that described in the general assumption marked "Exhibit A" and attached hereto.

11. The business of Capitol Chevrolet Company was carried on after June 5, 1944, by Capitol Chevrolet Co., a limited partnership.

12. Capitol Chevrolet Co. was a limited partnership.

13. The names of the partners were: James A. Kenyon, General Partner and Adams Service Co., Limited Partner. The total investment of James A. Kenyon and of Adams Service Co. was $107,604.88-$53,842.44, respectively.

14. On or about the 13th day of February, 1945, I was an owner of the Capitol Chevrolet Co.

15. From April 17, 1946, to December 21, 1948, I owned no stock in the Capitol Chevrolet Co. as an individual. I did hold 170 shares as trustee under a Patricia May Kenyon Trust. 255 shares of stock were held during this period by the J.A.K. Co., a Nevada corporation. I owned all the stock in the J.A.K. Co. On December 21, 1948, to July 26, 1950, the Patricia May Kenyon Trust owned 40 shares and the J.A.K. Co. owned 255. After July 26, 1950, neither the trust nor the J.A.K. Co. has had any interest in Capitol Chevrolet Co.

16. I was a director of Capitol Chevrolet Company at all times between October 1, 1942, and June

5, 1944. Capitol Chevrolet Company did not exist after that date. I was a director of the Capitol Chevrolet Co., the corporation, from April 10, 1946, to July 26, 1950.

17. I was vice-president of Capitol Chevrolet Co. from April 10, 1946, to July 26, 1950.

18. I transferred assets to the Capitol Chevrolet Co., the partnership, as outlined in answer to Interrogatory No. 13. The assets consisted of cash in the amount of $7,348.15 and contracts, notes and accounts receivable, inventories of automobiles, automobile parts, accessories, gasoline, oil and grease, prepaid insurance, rent, taxes, machinery shop equipment, office furniture and fixtures and service cars, of the value of $46,495.31.

19. Neither Capitol Chevrolet Co., the limited partnership, nor Capitol Chevrolet Co., the corporation, at any time assumed any of the liabilities.

20. Neither Capitol Chevrolet Co., the limited partnership, nor Capitol Chevrolet Co., the corporation, assumed any liability which I had assumed from Capitol Chevrolet Company.

21. Neither Capitol Chevrolet Co., the limited partnership, nor Capitol Chevrolet Co., the corporation, at any time assumed any liabilities which I had assumed from Capitol Chevrolet Company.

22. Neither Capitol Chevrolet Co., the limited partnership, nor Capitol Chevrolet Co., the corporation, at any time assumed any liabilities which I had assumed from Capitol Chevrolet Company.

Dated: December .., 1951.

.....

Subscribed and sworn to before me this .. day of December, 1951.

.....

Notary Public in and for the County of....., State of.....

EXHIBIT "A"

Ratification and Approval of All of the Stockholders of Capitol Chevrolet Company of the Resolution Adopted at the Special Meeting of the Board of Directors of Capitol Chevrolet Company on the 31st Day of May, 1943.

We, being the sole stockholders of Capitol Chevrolet Company, do hereby ratify and approve the foregoing and above referred to Resolution and do hereby consent to and authorize the election of said corporation to wind up and dissolve; and do hereby agree that upon the transfer to us of the assets of said corporation, we will assume and agree to pay all the debts, liabilities and obligations of said corporation, and will assume and perform any and all leases under or upon which the said corporation is now the lessee; and do further authorize the President and Secretary to have prepared and filed a Certificate of Election to Wind Up and Dissolve.

[Endorsed]: Filed March 5, 1952.

[Title of District Court and Causes 23171-30473.]

STIPULATION

It Is Hereby Stipulated and Agreed by and between the parties hereto that defendant and cross-claimant, Lawrence Warehouse Company, may have to and including the 25th day of March within which to file its opening brief in support of its cross-claim.

Dated: March 1, 1952.

HERBERT W. CLARK,
RICHARD J. ARCHER,
MORRISON, HOHFELD, FOERSTER, SHUMAN & CLARK,
/s/ By RICHARD J. ARCHER,
Attorneys for Cross-Defendants
W. R. WALLACE, JR.,
MAYNARD GARRISON,
JOHN R. PASCOE,
WALLACE, GARRISON, NORTON & RAY,
/s/ By JOHN R. PASCOE,
Attorneys for Defendant and Cross-Claimant

It is so ordered:

/s/ LOUIS E. GOODMAN,
Judge of the United States District Court

[Endorsed]: Filed March 13, 1952.

[Title of District Court and Causes 23171-30473.]

STIPULATION

It Is Hereby Stipulated and Agreed by and between the parties hereto that defendant and cross-claimant, Lawrence Warehouse Company, may have to and including the 29th day of April within which to file its replying memorandum.

Dated: April 24, 1952.

HERBERT W. CLARK,
RICHARD J. ARCHER,
MORRISON, HOHFELD, FOERSTER, SHUMAN & CLARK,
/s/ By RICHARD J. ARCHER,
Attorneys for Cross-Defendants
W. R. WALLACE, JR.,
MAYNARD GARRISON,
JOHN R. PASCOE,
WALLACE, GARRISON, NORTON & RAY,
/s/ By [Illegible]
Attorneys for Defendant and Cross-Claimant.

It is so ordered:

/s/ LOUIS E. GOODMAN,
Judge of the United States District Court.

[Endorsed]: Filed April 24, 1952.

[Title of District Court and Cause No. 30473.]

AMENDMENTS BY JAMES A. KENYON AND ADAMS SERVICE CO. TO FINDINGS OF FACT AND CONCLUSIONS OF LAW AS PROPOSED BY LAWRENCE WAREHOUSE COMPANY

Now comes cross-defendants James A. Kenyon and Adams Service Co. and propose the following amendments to the Findings of Fact and Conclusions of Law as proposed by Lawrence Warehouse Company:

1. That lines 11, to and including 22 of the title page, be omitted to the effect that separate Findings of Fact and Conclusions of Law be filed in Civil Action No. 23171 and in Civil Action No. 30473.

2. That the following paragraphs be added, following paragraph III, page 3:

III-A.

"Prior to the leasing of the Ice Palace, Capitol Chevrolet Company stored tires delivered to it by Lawrence Warehouse Company and belonging to Defense Supplies Corporation in eleven different warehouses in Sacramento (Tr. of Trials of Cross-Claims, pp. 58, 59)."

III-B.

"On March 1, 1943, Lawrence Warehouse Company and Defense Supplies Corporation entered into an agreement for the storage of the tires at the Ice Palace (Tr. of Trial of Complaint in No. 23171, Ex. 1)."

3. That lines 16, to and including 18 of paragraph VI, page 4, reading as follows:

> "that said cross-claimant did not have knowledge of or consent to or participate in any of the said negligent acts of Capitol Chevrolet Company."

be omitted and the following substituted:

> "prior to the leasing of the Ice Palace, Lawrence Warehouse Company inspected the Ice Palace and knew of its fire hazards (Tr. of Trials of Cross-Claims, pp. 59, 65-69)."

4. That the following paragraphs be added following paragraph VI, page 4:

VI-A.

"Capitol Chevrolet Company did not desire to consolidate the storage of the tires in the Ice Palace but was directed to do so by Lawrence Warehouse Company (Tr. of Trials of Cross-Claims, pp. 59, 62)."

VI-B.

"Lawrence Warehouse Company employed and maintained watchmen for the Ice Palace (Tr. of Trials of Cross-Claims, pp. 48-49; Tr. of Trial of Complaint in No. 23171, p. 93 (193*)). The watchmen's duties included watching against fire hazards (Tr. of Trials of Cross-Claims, pp. 62-63; Tr. of Trial of Complaint in No. 23171, p. 174 (281))."

VI-C.

"No officer, director, agent or employee of Capi-

---

*Numbers in parentheses indicate pages of Transcript on Appeal of No. 23171.

tol Chevrolet Company had any knowledge of the use by V. J. McGrew of an acetylene torch in the Ice Palace."

VI-D.

"The day before the fire V. J. McGrew commenced the use of an acetylene torch in the Ice Palace to the knowledge of the watchmen maintained and employed by Lawrence Warehouse Company. On the day of the fire said watchmen allowed V. J. McGrew to enter the Ice Palace, observed the hazardous location in which V. J. McGrew was using the acetylene torch and allowed V. J. McGrew to continue the use of said acetylene torch in the Ice Palace (Tr. of Trial of Complaint in No. 23171, pp. 105 (207), 109 (211), 172-174 (280-281))."

VI-E.

"On April 9, 1943, Lawrence Warehouse Company and Capitol Chevrolet Company failed and omitted to exercise reasonable care and diligence for the protection and preservation of said goods so deposited and stored by Defense Supplies Corporation in this, that they negligently permitted the use of said torch on said premises and negligently failed and omitted to see that it was used in a careful manner, and to provide adequate protection for said premises and said goods against the use of said acetylene torch, and maintained said premises and said goods in a negligent and careless manner so as to permit them to become ignited and destroyed by fire. By reason of such negligence and carelessness said premises and said goods of Defense Supplies Corpo-

ration were consumed and totally destroyed by fire."

VI-F.

"The negligence of V. J. McGrew, Lawrence Warehouse Company and Capitol Chevrolet Company concurred and joined together to destroy the goods of Defense Supplies Corporation as aforesaid."

VI-G.

"By reason of said negligent acts of V. J. McGrew, Lawrence Warehouse Company and Capitol Chevrolet Company, Defense Supplies Corporation was damaged in the sum of $41,975.15."

5. That lines 13, to and including 22 of paragraph VIII, page 5, reading as follows, be omitted:

"That during said period Adams Service Co. has never maintained any office and has never done any business or exercised any corporate functions except to hold stock in other corporations in its name for and on behalf of said F. Norman Phelps and Alice Phelps. That from and after the said above-mentioned transfer, said transferees actively participated in the defense of the complaint of Defense Supplies Corporation against defendants and in the defense of the cross-claim of Lawrence Warehouse Company against Capitol Chevrolet Company in said action No. 23171."

6. That the following paragraph be added, following paragraph VIII on page 5:

VIII-A.

"From February 13, 1945, to and including February 15, 1945, the trial of the complaint of De-

fense Supplies Corporation in No. 23171 occurred. At the trial, it appeared that Capitol Chevrolet Company, a corporation, had been dissolved and that its assets had been distributed to its stockholders, James A. Kenyon and Adams Service Co., a corporation wholly owned by F. Norman Phelps and Alice Phelps."

7. That paragraph XII, page 7, reading as follows, be omitted:

"That it is not true that at all times prior to said above-mentioned fire, cross-claimant, Lawrence Warehouse Company, retained and maintained an agent, servant and employee in the capacity of a guard or watchman in and about the said 'Ice Palace' and that at said times the said guard or watchman was acting within the scope of such agency and employment, but, on the contrary, it is true that said guard or watchman on said premises, though ultimately paid for by plaintiff, Defense Supplies Corporation, was at all times prior to said fire acting under the control and direction of Capitol Chevrolet Company with respect to the admission of persons into said 'Ice Palace', and particularly with respect to the admission of the said V. J. McGrew into the said 'Ice Palace.' "

8. That the following Conclusions of Law be added, following paragraph II on page 12:

III.

"The Capitol Chevrolet Company having been long since dissolved when the cross-claim of Law-

ence Warehouse Company in No. 30473 was filed, the action against it should be dismissed."

IV.

"Capitol Chevrolet Co. and J.A.K. Co., not having assumed any of the liabilities of the Capitol Chevrolet Company or of its successors, are not liable for the obligations of Capitol Chevrolet Company and the action against them should be dismissed."

V.

"F. Norman Phelps and Alice Phelps are not, and neither of them is, the alter ego of Adams Service Co., and they did not, nor did either of them, assume the liabilities of Capitol Chevrolet Company or its successors, and the action against them should be dismissed."

Dated: San Francisco, November 7, 1952.

Respectfully submitted,

/s/ HERBERT W. CLARK,
/s/ RICHARD J. ARCHER,
/s/ MORRISON, HOHFELD, FOERSTER, SHUMAN & CLARK,
/s/ JAMES B. ISAACS,
/s/ DEMPSEY, THAYER, DEIBERT & KUMLER,

Attorneys for Cross-Defendants James A. Kenyon and Adams Service Co.

Acknowledgment of Service attached.

Lodged Nov. 7, 1952.

[Title of District Court and Causes 23171-30473.]

NOTICE OF MOTION

To: Herbert W. Clark, Richard J. Archer, Morrison, Hohfeld, Foerster, Shuman & Clark, James B. Isaacs, and Dempsey, Thayer, Deibert & Kumler, Attorneys for Cross-Defendants:

Please Take Notice that Cross-Claimant, Lawrence Warehouse Company, by its undersigned attorneys will bring the within Motion on for hearing before the above-entitled Court, Room 258, United States Post Office Building, Seventh and Mission Streets, City and County of San Francisco, on Wednesday, the 3rd day of December, 1952, at the hour of 10:00 o'clock a.m., on said day or as soon thereafter as counsel can be heard.

November 21, 1952.

/s/ WM. R. WALLACE, JR.,
/s/ MAYNARD GARRISON,
/s/ JOHN PASCOE,
/s/ WALLACE, GARRISON, NORTON & RAY,
Attorneys for Cross-Claimant.

Acknowledgment of Service attached.

Motion of Cross-Claimant Lawrence Warehouse Company for an Order Vacating the Submission of the Above-Entitled Cause and to Re-Open the Same for Further Hearing and Evidence on the Question of the Liability of Certain Defendants.

Cross-claimant, Lawrence Warehouse Company,

respectfully moves that the above-entitled Court vacate the submission of the above-entitled cause as to cross-defendants F. Norman Phelps and Alice Phelps and re-open said cause for the purpose of taking further testimony therein and examining records in connection with the transactions between said cross-defendants and cross-defendant Adams Service Co., a corporation, upon the grounds that said orders, and each of them, will be in furtherance of justice.

Dated: November 21, 1952.

/s/ WM. R. WALLACE, JR.,
/s/ MAYNARD GARRISON,
/s/ JOHN R. PASCOE,
/s/ WALLACE, GARRISON, NORTON & RAY,
Attorneys for Cross-Claimant, Lawrence Warehouse Company.

Memorandum of Points and Authorities in Support of the Foregoing Motion

The Court has jurisdiction, in its discretion, to re-open the case for further testimony.

Patterson v. National Life & Accident Ins. Co. (1950), 183 F. (2d) 745, 747 (6 Cir.)

St. Mary's Bank v. Cianchette (1951), 99 Fed. Supp. 994 (D. C. Me.)

Schick Dry Shaver v. General Shaver Corp. (1938), 26 Fed. Supp. 190 (D. C. Conn.)

We submit that in this instance the Court should

exercise its discretion to re-open this cause as requested for the following reasons:

1. The Court has indicated in its opinion that the matter of the liability of F. Norman Phelps and Alice Phelps is "inconclusive." Such liability can be made conclusive by the examination of records which were never presented at the trial or prior thereto although Mr. Phelps stated they would be given to cross-claimant's counsel voluntarily (Dep. pp. 6, 8, 13 and 20) and his counsel, though stating that cross-claimant's counsel should not rely on his own promise by refraining to take legal steps (Dep. pp. 29, 30), the fact remains that the records were not produced; the Court feels the matter inconclusive without them and, if not now produced voluntarily as promised by Mr. Phelps, the process of the Court may be used to secure them.

It is not the furtherance of justice to leave inconclusive that which can be made conclusive.

2. Secondly, if the Court will re-examine the Brief presented in this cause by counsel on behalf of all of the cross-defendants, it will be observed that their cause is argued without distinction in this regard. It is implicit in such argument that counsel for cross-defendants concluded that the cross-defendants if liable at all, were liable without distinction.

3. Thirdly, the answers to the interrogatories and the testimony clearly show:

(a) That James A. Kenyon as general partner and Adams Service Co. as limited partner of Capitol Chevrolet, a co-partnership, assumed the liabili-

ties, received the assets and carried on the business of the old Capitol Chevrolet Company, a corporation. (F.N.P. Dep. p. 13.)

(b) That Adams Service Co. was a corporation whose capital stock was wholly owned by cross-defendants F. Norman Phelps and Alice Phelps. (F.N.P. Dep. p. 5.)

(c) That when the new Capitol Chevrolet Co., a corporation, was formed on April 10, 1946, to take over the business and assets of Capitol Chevrolet Co., a co-partnership, the capital stock of new Capitol Chevrolet Co. was not issued to Adams Service Co., a corporation (which had assumed the liabilities of old Capitol Chevrolet Company) but was issued directly to cross-defendants F. Norman Phelps and Alice Phelps. (Capitol Chevrolet Co. Ans. to Interrogatories No. 1.)

We submit that such issuance of shares directly to F. Norman Phelps and Alice Phelps demonstrates that such persons were the alter ego of Adams Service Co. and it would be a fraud upon the creditors of Adams Service Co. not to disregard the corporate entity and hold cross-defendants F. Norman Phelps and Alice Phelps liable to cross-claimant Lawrence Warehouse Company.

4. Lastly, the depositions of both F. Norman Phelps and Alice Phelps (sole stockholders of Adams Service Co.) were taken and introduced in evidence at the trial.

Cross-defendant F. Norman Phelps testified that he thought the corporation had some assets but he did not know what they were. (F.N.P. Dep. p. 14.)

Cross-defendant Alice Phelps testified that she did not know whether such corporation had assets or had no assets. (A.P. Dep. p. 9.)

The only fair inference from such testimony is that such assets, if any, are too meagre to satisfy the large judgment which will be rendered herein. Certainly the sole stockholders of a corporation would be informed as to its assets if they were substantial.

It follows that the judgment herein should run not only against Adams Service Co. but also against cross-defendants F. Norman Phelps and Alice Phelps who have received upon the incorporation of new Capitol Chevrolet Co. in April of 1946 the assets of Adams Service Co. The corporation has been held because it expressly assumed the liabilities here in question. The Phelps should be held because they have received in an alter ego transaction the assets of Adams Service Co.

We respectfully submit that in furtherance of justice and in order to avoid a miscarriage of justice this Court should grant the motions and render its orders as therein requested.

Respectfully submitted,

/s/ WM. R. WALLACE,
/s/ MAYNARD GARRISON,
/s/ JOHN R. PASCOE,
/s/ WALLACE, GARRISON, NORTON & RAY,
Attorneys for Cross-Claimant

Draft of Proposed Order

Good Cause Appearing Therefor, it is Hereby Ordered:

1. That the Order of Submission of the above-entitled cause be, and it hereby is, vacated as to cross-defendants F. Norman Phelps and Alice Phelps;

2. That said cause be set for further hearing on the cross-claim of Lawrence Warehouse Company against such cross-defendants on....., the .....day of....., 195...., at the hour of.....o'clock ..M., on said day.

.....

United States District Judge.

[Endorsed]: Filed Nov. 21, 1952.

[Title of District Court and Causes 23171-30473.]

NOTICE OF MOTION

To: Herbert W. Clark, Richard J. Archer, Morrison, Hohfeld, Foerster, Shuman & Clark, James B. Isaacs, and Dempsey, Thayer, Deibert & Kumler, Attorneys for Cross-Defendants:

Please take notice that Cross-Claimant, Lawrence Warehouse Company, by its undersigned attorneys will bring the within Motion on for hearing before the above-entitled Court, Room 258, United States Post Office Building, Seventh and Mission Streets, City and County of San Francisco, on Tuesday, the 16th day of December, 1952, at the hour of

2:00 o'clock p.m. on said day or as soon thereafter as counsel can be heard.

Dated: December 9, 1952.

/s/ W. R. WALLACE, JR.
/s/ MAYNARD GARRISON,
/s/ JOHN R. PASCOE,
/s/ WALLACE, GARRISON, NORTON & RAY,
Attorneys for Cross-Claimant.

Acknowledgment of Service attached.

Motion for an Order Modifying Opinion And Order for Judgment

Cross-Claimant, Lawrence Warehouse Company, respectfully moves that the above-entitled Court make and enter its Order herein modifying the Opinion and Order for Judgment filed in this cause on the 12th day of September, 1952, by deleting therefrom:

> "The evidence is inconclusive as to whether F. Norman Phelps and Alice Phelps might be treated as the alter ego of the Adams Service Co. The action against them is therefore dismissed."

and substituting therefor:

> "Counsel for cross-defendants expressly conceded in their brief herein that if Adams Service Co. was liable, F. Norman Phelps and Alice Phelps are also liable. Judgment should, therefore, also be rendered against such cross-defendants in cause No. 30473."

Dated: December 9, 1952.

/s/ W. R. WALLACE, JR.
/s/ MAYNARD GARRISON
/s/ JOHN R. PASCOE,
/s/ WALLACE, GARRISON, NORTON & RAY,
Attorneys for Cross-claimant,
Lawrence Warehouse Company.

Memorandum of Points and Authorities in Support of the Foregoing Motion

On page 23, lines 9 and 10 of the Reply Brief filed herein on behalf of all Cross-defendants it is stated:

> "It is not contended that F. Norman Phelps and Alice Phelps are not liable if Adams Service Co. is liable."

This Court has held Adams Service Co. liable. We submit that upon the basis of the foregoing contention of counsel for F. Norman Phelps and Alice Phelps, it should modify its Opinion and Order for Judgment as above requested.

Nelson vs. United States (1945), 149 F. (2d) 692 (9 Cir.)

Respectfully submitted,

/s/ W. R. WALLACE JR.
/s/ MAYNARD GARRISON
/s/ JOHN R. PASCOE
/s/ WALLACE, GARRISON, NORTON & RAY,
Attorneys for Cross-Claimant.

[Endorsed]: Filed Dec. 9, 1952.

[Title of District Court and Cause No. 30473.]

ORDER PURSUANT TO RULE 54(b)

It is Hereby Ordered and Determined nunc pro tunc that there is no just reason for delay in entering the Judgment in the above-entitled action dated February 11, 1953; and

It is Further Ordered and Directed nunc pro tunc that said Judgment be entered.

Dated: San Francisco, March 3, 1953.

/s/ LOUIS E. GOODMAN,
United States District Judge.

[Endorsed]: Filed March 3, 1953.

[Title of District Court and Cause No. 30473.]

NOTICE OF APPEAL TO COURT OF APPEALS UNDER RULE 73(b)

Notice is hereby given that each of James A. Kenyon, Adams Service Co., F. Norman Phelps and Alice Phelps, named above as cross-defendants, hereby severally appeals to the United States Court of Appeals for the Ninth Circuit from the final judgment entered in this action on February 12, 1953.

Dated: San Francisco, March 10, 1953.

/s/ HERBERT W. CLARK
/s/ RICHARD J. ARCHER
/s/ MORRISON, HOHFELD, FOERSTER, SHUMAN & CLARK
/s/ JAMES B. ISAACS
/s/ DEMPSEY, THAYER, DEIBERT & KUMLER

Attorneys for Appellants James A. Kenyon, Adams Service Co., F. Norman Phelps and Alice Phelps.

[Endorsed]: Filed March 10, 1953.

[Title of District Court and Cause No. 30473.]

DESIGNATION BY JAMES A. KENYON, ADAMS SERVICE CO., F. NORMAN PHELPS AND ALICE PHELPS OF PORTIONS OF RECORD

To: The Clerk of the United States District Court for the Northern District of California, Southern Division:

Pursuant to Rule 75(a) of the Federal Rules of Civil Procedure, appellants designate the following portions of the record to be contained in the record on appeal in the above-entitled action to the United States Court of Appeals for the Ninth Circuit:

1. The complete record and all the proceedings

and evidence in the action including but not limited to the following:

(a) The complaint of Reconstruction Finance Corporation;

(b) The answer of defendant James A. Kenyon;

(c) The answer of defendant Capitol Chevrolet Company;

(d) The answer of defendant Lawrence Warehouse Company and cross-claim against certain defendants;

(e) Separate judgment against defendants Lawrence Warehouse Company, Seaboard Surety Company, V. J. McGrew and Capitol Chevrolet Company dated November 20, 1951;

(f) The answer of cross-defendant Capitol Chevrolet Company to cross-claim of Lawrence Warehouse Company;

(g) The answer of cross-defendant Capitol Chevrolet Co. to cross-claim of Lawrence Warehouse Company;

(h) The answer of cross-defendant James A. Kenyon to cross-claim of Lawrence Warehouse Company;

(i) The first amended answer to the cross-complaint of Lawrence Warehouse Company by cross-defendants Capitol Chevrolet Company, James A. Kenyon and Capitol Chevrolet Co.;

(j) Amendment to cross-claim of Lawrence Warehouse Company;

(k) Answer to amendment to cross-claim of Lawrence Warehouse Company by Capitol Chevrolet

Company, James A. Kenyon and Capitol Chevrolet Co.;

(l) Return of service of summons of cross-claim of Lawrence Warehouse Company and return of service of summons of amendment to cross-claim of Lawrence Warehouse Company;

(m) Motions to dismiss by cross-defendants Capitol Chevrolet Company, James A. Kenyon, Capitol Chevrolet Co., F. Norman Phelps and Alice Phelps filed March 5, 1952;

(n) Answer to cross-complaint of Lawrence Warehouse Company by F. Norman Phelps and Alice Phelps;

(o) Answer to amendment to cross-claim of Lawrence Warehouse Company by F. Norman Phelps and Alice Phelps;

(p) Order for consolidation filed March 4, 1952;

(q) Order for judgment dated September 8, 1952;

(r) Motion of cross-claimant Lawrence Warehouse Company for an order vacating the submission of the above-entitled cause and to reopen the same for further hearing and evidence on the question of the liability of certain defendants;

(s) Motion for an order modifying opinion and order for judgment;

(t) Order amending order for judgment dated January 15, 1953;

(u) The findings of fact and conclusions of law filed February 11, 1953;

(v) The judgment dated February 11, 1953;

(w) The notice of appeal by the above-named appellants;

(x) All the docket entries in the above-entitled action;

(y) The order pursuant to Rule 54(b) dated March 3, 1953;

(z) This designation.

Dated: San Francisco, March 12, 1953.

/s/ HERBERT W. CLARK
/s/ RICHARD J. ARCHER
/s/ MORRISON, HOHFELD, FOERSTER, SHUMAN & CLARK
/s/ JAMES B. ISAACS
/s/ DEMPSEY, THAYER, DEIBERT & KUMLER

Attorneys for Appellants James A. Kenyon, Adams Service Co., F. Norman Phelps and Alice Phelps.

Acknowledgment of Service attached.

[Endorsed]: Filed March 12, 1953.

[Title of District Court and Causes 23171-30473.]

DESIGNATION BY CROSS-CLAIMANT AND APPELLEE, LAWRENCE WAREHOUSE COMPANY, OF PORTIONS OF RECORD

To: The Clerk of the United States District Court for the Northern District of California, Southern Division:

Pursuant to Rule 75(a) of the Federal Rules of Civil Procedure, cross-claimant and appellee, Lawrence Warehouse Company, hereby designates the following portions of the record to be contained in the record on appeal in the above-entitled actions, as consolidated by Order of Court, to the United States Court of Appeals for the Ninth Circuit:

Items filed and numbered in action No. 23171 G alone:

1. Complaint of Defense Supplies Corporation;

2. Answer of Defendant Lawrence Warehouse Company and Cross-Claim Against Certain Defendants;

3. Answer of Capitol Chevrolet Company and Cross-Claim Against Certain Defendants;

4. Answer of Capitol Chevrolet Company to Cross-Claim of Lawrence Warehouse Company;

5. Opinion filed January 9, 1946;

6. Findings of Fact and Conclusions of Law, filed April 15, 1946;

7. Judgment, filed April 15, 1946;

8. Reporter's Transcript and all exhibits and evidence admitted and filed;

9. Mandate of the Court of Appeals;

10. First Amended Answer of Capitol Chevrolet Company To Cross-Claim, filed March 3, 1952;

11. Page 23, lines 5 to 10 of Reply Brief dated April 11, 1952, filed on behalf of all cross-defendants, wherein it is stated:

"If liability on the part of Capitol Chevrolet Company exists, it is true that this liability was expressly assumed by James A. Kenyon and Adams Service Co., and their successors and privies except Capitol Service Co., and the new corporation. It is not contended that F. Norman Phelps and Alice Phelps are not liable if Adams Service Co. is liable."

12. Page 1 of Reply Brief dated April 11, 1952, filed on behalf of all cross-defendants, wherein it is stated:

"Answering Memorandum of Cross Defendants Capitol Chevrolet Company, James A. Kenyon, Capitol Chevrolet Co., Adams Service Co., J. A. K. Co., F. Norman Phelps and Alice Phelps."

Items filed and numbered in action No. 30473 alone:

1. Complaint of Reconstruction Finance Corporation;

2. Answer of Defendant James A. Kenyon;

3. Answer of Defendant Capitol Chevrolet Co.;

4. Answer of Defendant Lawrence Warehouse Company And Cross-Claim Against Certain Defendants;

5. Return of Summons to Alice and F. Norman Phelps;

6. Answer of Cross-Defendant Capitol Chevrolet Co. to Cross-Claim of Lawrence Warehouse Company;

7. Answer of Cross-Defendant Capitol Chevrolet Company to Cross-Claim of Lawrence Warehouse Company;

8. Answer of Cross-Defendant James A. Kenyon to Cross-Claim of Lawrence Warehouse Company;

9. Separate Judgment against defendants Lawrence Warehouse Company, Seaboard Surety Company, V. J. McGrew, and Capitol Chevrolet Company, dated November 21, 1951;

10. Assignment of Judgment, dated November 29, 1951;

11. Notice of Payment of Judgment And Claim to Contribution or Repayment, dated December 6, 1951;

12. First Amended Answer to Cross-Complaint, dated January 3, 1952;

13. Amendment to Cross-Claim of Lawrence Warehouse Company;

14. Answer to Amendment to Cross-Claim of Lawrence Warehouse Company (by Capitol Chevrolet Company, James A. Kenyon, and Capitol Chevrolet Co.);

15. Notice of Time and Place of Taking Deposition of Alice Phelps;

16. Answer to Amendment to Cross-Claim of Lawrence Warehouse Company by F. Norman Phelps and Alice Phelps;

17. Answer to Cross-Complaint of Lawrence

Warehouse Company by F. Norman Phelps and Alice Phelps;

18. Order Pursuant to Rule 54 (b);

19. Amendments by James A. Kenyon and Adams Service Co. to Findings of Fact and Conclusions of Law as Proposed by Lawrence Warehouse Company.

Items filed and numbered in both actions Nos. 23171 G and 30473:

1. Order For Consolidation, dated March 4, 1952;

2. Order For Judgment dated September 8, 1952;

3. Notice of Motion, Motion of Cross-Claimant Lawrence Warehouse Company For An Order Vacating The Submission of The Above-Entitled Cause And To Reopen The Same For Further Hearing and Evidence on The Question of The Liability of Certain Defendants, Memorandum of Points and Authorities in Support of The Foregoing Motion;

4. Notice of Motion, Motion For An Order Modifying Opinion and Order for Judgment, and Memorandum of Points and Authorities in Support of the Foregoing Motion;

5. Order Amending Order for Judgment, filed January 15, 1953;

6. Findings of Fact and Conclusions of Law, signed February 11, 1953;

7. Judgment, dated February 11, 1953, entered February 12, 1953.

8. Memorandum of Court Upon Signing of Judgment, dated February 11, 1953;

9. Notice of Appeal by Clerk, District Court, dated March 11, 1953;

10. Stipulation and Order Extending Time to File Opening Brief of Lawrence Warehouse Company until March 25, 1952;

11. Reporter's transcript and all exhibits and evidence admitted in trial of cross-claims 23171 G and 30473, including but not limited to Interrogatories Propounded by Cross-Claimant, Lawrence Warehouse Company, to Cross-Defendant Capitol Chevrolet Co., Interrogatories Propounded by Cross-Claimant, Lawrence Warehouse Company, to Cross-Defendant Capitol Chevrolet Company, Interrogatories Propounded by Cross-Claimant, Lawrence Warehouse Company, to Cross-Defendant James A. Kenyon, and the separate Answers thereto filed by each of said cross-defendants including exhibits attached to said Answers.

12. Stipulation and Order dated April 24, 1952;

13. Designation by Cross-Claimant and Appellee, Lawrence Warehouse Company, of Portions of Record, Proceedings and Evidence to be Contained in Record on Appeal.

Dated: March 25, 1953.

/s/ W. R. WALLACE JR.
/s/ MAYNARD GARRISON
/s/ JOHN R. PASCOE,
/s/ WALLACE, GARRISON, NORTON & RAY,
Attorneys for Cross-Claimant and Appellee.

Acknowledgment of Service attached.

[Endorsed]: Filed March 26, 1953.

[Title of District Court and Causes 23171-30473.]

NOTICE OF MOTION TO STRIKE OR CONSOLIDATE THE DESIGNATIONS OF CROSS-DEFENDANTS AND THEIR NOTICES OF APPEAL.

To: Cross-Defendants Capitol Chevrolet Company, James A. Kenyon, Adams Service Co., F. Norman Phelps and Alice Phelps and to Messrs. Morrison, Hohfeld, Foerster, Shuman & Clark, James B. Isaacs, Dempsey, Thayer, Deibert & Kumler:

You, and each of you, will please take notice that on Tuesday, the 7th day of April, 1953, at 10:00 o'clock a.m., of said day, or as soon thereafter as counsel can be heard, in the courtroom of the Honorable Louis E. Goodman, Room 258, United States Post Office Building, Seventh and Mission Streets, City of San Francisco, Cross-Claimant, Lawrence Warehouse Company, will move the Court for an order striking the Designation by James A. Kenyon, Adams Service Co., F. Norman Phelps and Alice Phelps of Portions of Record, Proceedings and Evidence to be Contained in Record on Appeal and the like Designation by Capitol Chevrolet Company, or, in the alternative, for an order consolidating said Designations.

Cross-Claimant, Lawrence Warehouse Company, will at the same time move said Court for an order striking the Notice of Appeal of James A. Kenyon, Adams Service Co., F. Norman Phelps, and Alice

Phelps and the Notice of Appeal of Capitol Chevrolet Company, or, in the alternative, for an order consolidating said Notices of Appeal. Said motions will be made on the ground that said actions were ordered consolidated pursuant to Rule 42(a) of the Federal Rules of Civil Procedure and were therefore merged into one action for all purposes, including appeal from the judgment therein entered; that upon separate appeals from one judgment, there can only be one record on appeal.

Dated: March 25, 1953.

/s/ W. R. WALLACE JR.
/s/ MAYNARD GARRISON
/s/ JOHN R. PASCOE
/s/ WALLACE, GARRISON, NORTON & RAY,
Attorneys for Cross-Claimant and Appellee.

Memorandum of Points and Authorities
In Support of Motions

Nat. Union Fire Ins. Co. vs. Ches. & O. Ry. Co. (1933), 4 F. Supp. 25.

Bley vs. Trav. Ins. Co. (1939), 27 F. Supp. 351.

Barker vs. Hartford Fire Ins. Co. (1951), 100 F. Supp. 1022.

George vs. Leonard (1949), 84 F. Supp. 205, 208, reversed on other grounds 178 F. 2d 312, cert. den. 339 U.S. 965, 94 L. Ed. 1374.

1 C.J.S. 1341.

Rule 75(k), Fed. Rules Civ. Proc.

Acknowledgment of Service attached.

[Endorsed]: Filed March 26, 1953.

[Title of District Court and Causes 23171-30473.]

ORDER RE MOTION TO STRIKE DESIGNATIONS IN RECORD ON APPEAL

The above entitled cases were consolidated for trial. A single judgment disposing of all the issues in both cases was entered.

Certain of the defendants have appealed. The manner of appeal and of making up the record has caused some differences between the parties. A motion to strike or consolidate designations made by cross-defendants as well as their notices of appeal has been presented and argued.

I am convinced that this is "Much Ado About Nothing." As long as a "true"[1] and proper record goes to the Appellate Court, either side will be in a position to urge any relevant contentions upon the appeal.

Consequently, it is ordered that a single record on appeal containing all the matters designated by the parties shall be prepared in respect to the sev-

---

[1] Rule 75(h) F.R.C.P.

eral appeals taken from the judgment entered in the consolidated action. Rule 75 (k) F.R.C.P.

Dated: April 15, 1953.

/s/ LOUIS E. GOODMAN,
United States District Judge.

[Endorsed]: Filed April 15, 1953.

[Title of District Court and Causes 23171-30473.]

SUPPLEMENTAL DESIGNATION BY CROSS-CLAIMANT AND APPELLEE, LAWRENCE WAREHOUSE COMPANY

To: The Clerk of the United States District Court for the Northern District of California, Southern Division:

Cross-claimant and appellee, Lawrence Warehouse Company, hereby designates the following additional portions of the record to be contained in the record on appeal in the above-entitled actions, as consolidated by Order of Court, to the United States Court of Appeals for the Ninth Circuit:

1. Notice of Motion to Strike or Consolidate the Designations of Cross-Defendants And Their Notices of Appeal, filed March 26, 1953;

2. Order Re: Motion To Strike Designations In Record on Appeal, dated April 15, 1953;

3. Supplemental Designation by Cross-Claimant

and Appellee, Lawrence Warehouse Company, of Portions of Record To Be Contained In Record On Appeal, dated April 16, 1953.

Dated: April 16, 1953.

/s/ W. R. WALLACE, JR.
/s/ MAYNARD GARRISON,
/s/ JOHN R. PASCOE,
/s/ WALLACE, GARRISON, NORTON & RAY,
Attorneys for Cross-Claimant and Appellee.

Acknowledgment of Service attached.

[Endorsed]: Filed April 17, 1953.

[Title of District Court and Causes 23171-30473.]

CERTIFICATE OF CLERK

I, C. W. Calbreath, Clerk of the United States District Court for the Northern District of California, do hereby certify that the foregoing and accompanying documents and exhibits, listed below, are the originals (or true copies thereof) filed in the above-entitled cases, and that the same constitute the record on appeal herein as designated by the respective parties to the appeal:

Complaint (No. 23171).

Answer of defendant, Capitol Chevrolet Company, and Cross-claim against Clyde W. Henry and Constantine Parella, (No. 23171).

Answer of Cross-defendant, Constantine Parella to cross-complaint (No. 23171).

Answer of defendant Lawrence Warehouse Co. and Cross-claim against Clyde W. Henry, Constantine Parella and Capitol Chevrolet Co. (No. 23171).

Answer of Cross-defendant, Constantine Parella to cross-complaint of Lawrence Warehouse Company. (No. 23171).

Answer of Cross-defendant Capitol Chevrolet Company to cross-complaint of Lawrence Warehouse Co. (No. 23171).

Answer of Cross-defendant Clyde W. Henry to cross-complaint of Lawrence Warehouse Company (No. 23171).

Answer of Cross-defendant Clyde W. Henry to cross-complaint of Capitol Chevrolet Co. (No. 23171).

Copy of notice that case will appear on calendar to be set for trial (No. 23171).

Notice of time and place of trial (No. 23171).

Opinion filed January 9, 1946 (No. 23171).

Minutes of February 20, 1946 (No. 23171).

Findings of fact and conclusions of law filed April 15, 1946 (No. 23171).

Judgment filed and entered April 15, 1946 (No. 23171).

Mandate of United States Court of Appeals, Ninth Circuit, (No. 23171).

First amended answer of Capitol Chevrolet Company to cross-claim of Lawrence Warehouse Co. (No. 23171).

Notice of motion by Capitol Chevrolet Co. to strike evidence (No. 23171).

Complaint on judgment (No. 30473).

Summons issued April 12, 1951 and filed on return April 24, 1951 (No. 30473).

Answer of Capitol Chevrolet Co. to complaint (No. 30473).

Answer of James A. Kenyon to complaint (No. 30473).

Answer of Lawrence Warehouse Co. to complaint and Cross-claim against Capitol Chevrolet Company, a corporation, James A. Kenyon and Capitol Chevrolet Co., a corporation (No. 30473).

Answer of Capitol Chevrolet Company to cross-claim (No. 30473).

Answer of Capitol Chevrolet Co. to cross-claim (No. 30473).

Answer of James A. Kenyon to cross-claim (No. 30473).

Separate judgment against defendants, Lawrence Warehouse Co., Seaboard Surety Company, V. J. McGrew and Capitol Chevrolet Company, filed November 20, 1951 (No. 30473).

Interrogatories propounded by Cross-Claimant Lawrence Warehouse Co. to Cross-defendant, Capitol Chevrolet Co. (No. 30473).

Interrogatories propounded by Cross-Claimant Lawrence Warehouse Co. to Cross-defendant, Capitol Chevrolet Company (No. 30473).

Interrogatories propounded by Cross-Claimant Lawrence Warehouse Co. to Cross-defendant, James A. Kenyon.

Answers to interrogatories propounded to Capitol Chevrolet Co. (No. 30473).

Answers to interrogatories propounded to Capitol Chevrolet Company (No. 30473).

Answers to interrogatories propounded to James A. Kenyon (No. 30473).

Assignment of judgment (No. 30473).

Notice of payment of judgment and claim to contribution or repayment (No. 30473).

First amended answer to cross-complaint (No. 30473).

Amendment to Cross-claim of Lawrence Ware-. house Co. (No. 30473).

Summons issued February 15, 1952 on Cross-claim (No. 30473).

Notice of time and place of taking deposition of Alice Phelps (No. 30473).

Answer to amendment to Cross-claim (No. 30473).

Motion to dismiss Cross-Claim (No. 30473).

Answer of F. Norman Phelps and Alice Phelps to Cross-complaint (No. 30473).

Answer of F. Norman Phelps and Alice Phelps to amendment to Cross-claim (No. 30473).

Proposed amendments by James A. Kenyon and Adams Service Co. to findings of fact and conclusions of law as proposed by Cross-Claimant (No. 30473).

Answering memorandum of Cross-defendants, filed April 11, 1952 (No. 23171).

Order consolidating actions for trial.

Stipulation and order extending time of Cross-

Claimant, Lawrence Warehouse Co. to file opening brief.

Stipulation and order extending time of Cross-Claimant, Lawrence Warehouse Co. to file replying memorandum.

Order for judgment, filed Sept. 12, 1952.

Motion by Lawrence Warehouse Co. for an order vacating the submission of case and to re-open the same for further hearing.

Motion for order modifying opinion and order for judgment.

Order amending order for judgment.

Findings of fact and conclusions of law.

Judgment filed February 11, 1953 and entered February 12, 1953.

Order pursuant to Rule 54(b) (No. 30473).

Docket entries (No. 23171).

Docket entries (No. 30473).

Notice of appeal (No. 23171).

Notice of appeal (No. 30473).

Copy of Clerk's notice of filing notices of appeal.

Notice of motion of Appellee to strike or consolidate the designations of Appellants.

Order re motion to strike designations in record on appeal.

Order extending time for filing record on appeal (No. 23171).

Order extending time for filing record on appeal (No. 30473).

Designation by Capitol Chevrolet Company of portions of record to be contained in record on appeal (No. 23171).

Designation by James A. Kenyon, et al of portions of record to be contained in record on appeal (No. 30473).

Designation by Appellee of portions of record to be contained in record on appeal.

Supplemental designation by Appellee of additional records to be contained in record on appeal.

Reporter's transcript, Feb. 13, 14, 15, 1945.

Reporter's transcript, March 6, 1952.

Reporter's transcript, January 8, 9, 1952.

Deposition of Alice Phelps.

Deposition of F. Norman Phelps.

Plaintiff's Exhibits 1 to 14 (Case No. 23171).

Defendants' Exhibit A and B (Case No. 23171).

Cross-claimant's Exhibit 1.

Cross-defendants' Exhibits A to F.

In Witness Whereof I have hereunto set my hand and affixed the seal of said District Court this 15th day of May, 1953.

[Seal] C. W. CALBREATH,
Clerk.

[Title of District Court and Cause No. 30473.]

REPORTER'S TRANSCRIPT

January 8 and 9, 1952

Before Hon. Lewis E. Goodman, Judge.

Appearances: Wallace, Garrison, Norton & Ray, by Maynard Garrison, Esq., and John R. Pascoe, Esq., representing Lawrence Warehouse Corp., Cross-Claimant. Morrison, Hohfeld, Foerster, Schuman & Clark, by Herbert W. Clark, Esq., and Richard J. Archer, Esq., and James B. Isaacs; Dempsey, Thayer, Deibert & Kumler, representing James A. Kenyon, Capitol Chevrolet Company and Capitol Chevrolet Co., Cross-Defendants. [2*]

The Clerk: RFC versus the Capitol Chevrolet Company, pre-trial conference. Will respective counsel please state their appearances for the record?

Mr. Garrison: Maynard Garrison and Mr. John R. Pascoe of Wallace, Garrison, Norton & Ray, representing Lawrence Warehouse Corporation.

Mr. Archer: Richard J. Archer and Herbert W. Clark of Morrison, Hohfeld, Foerster, Schuman & Clark, and James B. Isaacs; Dempsey, Thayer, Deibert & Kumler for the cross-defendants James A. Kenyon, Capitol Chevrolet Company and Capitol Chevrolet Co.

The Court: I should like the record to show

---

* Page numbering appearing at top of page of original Reporter's Transcript of Record.

that counsel consulted with me in chambers the other day concerning this matter, the case having been set for trial today, in view of the statements that were made, particularly to the effect that one of the lawyers was coming from Los Angeles; though I was engaged in the trial of a jury case, I thought that we might possibly dispose of the matter at a pre-trial conference or at least determine whether we could or not, and it was for that reason I set it for this hour so that counsel from out of town could be accommodated, and if we are not able to conclude what we have to do this afternoon, we can finish it up tomorrow, because I anticipate that the case I have on will go to the jury possibly by noontime tomorrow.

Mr. Archer: That is satisfactory with us, your Honor. [3]

Mr. Garrison: Your Honor will recall that we were here once before when the Defense Supplies Corporation of the Reconstruction Finance Corporation was among us, and we did not get completed with this phase of the pre-trial conference; it seemed to me with some of the developments that occurred in connection with the written interrogatories that were submitted and the answers that we ought to have another, and so today I would like to in connection with this pre-trial conference move your Honor for a summary judgment against certain of the defendants, and I think the best way to get this thing before us and in our mind is for me to make a short statement of some of the background of it. I know your Honor has it in mind,

but in order that we focus our thinking right on the specific points I have in mind, I would like to take just a few minutes to review the factual situation.

Your Honor will recall that this all originated in connection with a rubber conservation program of the Government called the Idle Tire Program, and as a part of that the Government made arrangements with various persons to warehouse these tires that were brought in and submitted by the public, and among those persons was the Lawrence Warehouse Corporation. That corporation made what I might refer to as a master contract with the Defense Supplies Corporation and agreed to in certain cities handle the warehousing for the Government, and the Lawrence Warehouse Corporation, pursuant to that contract [4] with the Defense Supplies, made agency contracts with others in the various communities where Lawrence did not have facilities for the warehousing of those tires, and among those contracts was one made with the Capitol Chevrolet Company in Sacramento.

The contract of the agency made between the Defense Supplies and Lawrence provided that the Lawrence Warehouse should have the duties of a general warehouseman to the Defense Supplies in respect to these tires, and in fact the language says, "Your general responsibility for the care and protection of the tires will be limited to such care as required by law governing warehouses in your state and to the exercise of ordinary care on your part."

The contract of the agency between Lawrence and

Capitol was one made after Capitol had been approved by the Defense Supplies and that contract provided, first, in paragraph 2—and incidentally, the contract is in the transcript which will be available to your Honor—first, to furnish suitable storage space for the storage of such tires and tubes as may be delivered to agent (that is, Capitol) to the total available capacity of agent.

Paragraph 3 provided, to store and safeguard the storage of such tires and tubes as are received by agent Capitol.

Paragraph 7, agent to agree that he will, at its own cost and expense, keep said demised premises in good order and [5] repair, and that the principal shall not be called upon (the principal being Lawrence) or required to make any repairs of any kind or nature either upon or to said demised premises.

8. Capitol agrees to indemnify the principle, Lawrence, against loss or damage resulting from a failure on the part of the agent to perform any of the duties or obligations above set forth.

Now, then, Capitol was actually a Chevrolet dealer in Sacramento and it did not have warehouse facilities sufficient for this tire program, as it ultimately developed. So it went out and leased a building near Sacramento, which I believe is referred to as the Ice Palace, a defunct ice skating rink, probably, first having that building approved by the Defense Supplies for use as a warehouse for this purpose, and executed a lease with the owners of that property, a Mr. Clyde W. Henry and Mr. Constantine Parella, and that lease was in the usual

form, and it provided that Capitol would maintain the property, that it would avoid violations of law with respect to fire, and keep the property susceptible to insurance coverage, and so forth; in fact, established the relationship with the owner of landlord and tenant.

The actual carrying out of the storage and the warehousing was under very close and rigid supervision of Defense Supplies. They sent inspectors, first with respect to the warehouse, and secondly with respect to the manner of handling the tires.

They provided elaborate instructions on storing, stacking, counting and so forth, and the arrangements between the Defense Supplies and Capitol were very complete and are all a matter of record. So complete were they that the Defense Supplies instructed Capitol that under no circumstances were they to permit anyone to enter the premises.

That was probably as well from a security standpoint as from any other, we being in a major war at that time, and they also in connection with those rigid instructions gave to Capitol the names of persons who might be permitted to enter, and it is interesting to note that of that group of seven or eight persons specified, not even Lawrence Warehouse was permitted in those premises, either Lawrence or any of its agents or employees.

When this warehouse was partially filled with tires, one of the owners, I believe Mr. Henry, had occasion to want to remove some——

The Court: I think you need not necessarily go over this. I think what you stated is included in

the statement of facts in the opinion in the original case, if I remember correctly.

Mr. Garrison: Yes, it is. I will accelerate. I wanted to bring us up to that date. At any rate, the fire occurred by reason of the man's use of an acetylene torch. The point I wanted to make in that connection was that he was in there by securing permission from Capitol against the instructions [7] of the Defense Supplies Corporation.

The Court: May I interrupt you to ask you this question: Is it your contention in connection with the cross-complaint here that the Capitol Chevrolet Company had the same obligations of warehousemen as the Lawrence Company had to the Defense Supplies Corporation?

Mr. Garrison: Exactly, exactly, and in addition they agreed and contracted with us to hold us harmless from any loss by reason of their negligence. I read that language. That is paragraph 8 of their contract with us: "to indemnify the principal Lawrence against loss or damage resulting from a failure on the part of the agent Capitol to perform any of the duties or obligations set forth above." And those duties or obligations are to furnish suitable storage space for the storage of such tires and tubes as may be delivered to it, to store and safeguard the storage of such tires and tubes as are received by Capitol, you see.

The Court: And you contend under the facts as they were found by the court in the original case as a matter of law that would be a breach on the

part of the Capitol Chevrolet Company of those provisions of that contract?

Mr. Garrison: The Court held, and the Circuit Court of Appeals in affirming your decision said that the fire resulted from the commission of the man's entry without supervision or protection, and, of course, to us it was not only an act of [8] negligence under our contract to safeguard the property but also it created in us a right to be indemnified under this "hold harmless" agreement with Capitol. There isn't any question under the evidence, as approved by the Circuit Court of Appeals in its affirming opinion, that the fire was caused by the torch and in no other way.

The Court: It is your contention, then, that this is a matter of law as to whether there is a liability?

Mr. Garrison: Yes. This is all before us. It is in the record. And as your Honor knows, you reserved this cross-complaint or counter-claim for consideration at a later date, which is now.

The Court: I did not do that of my own volition. As I recall it, all the parties wanted that done.

Mr. Garrison: That is right. That is right. It was stipulated, and your Honor made that order. I think now to keep this record straight I ought to move your Honor for a consolidation of that cross-claim with the present action which has been filed.

The Court: Is there a new action?

Mr. Garrison: Yes, there is a new action filed. You see, the Defense Supplies sued on the judgment, and in that action we cross-claimed in the same kind of a case that we brought in the original

cross-claim, but we named other defendants as well. So we do have two cross-claims, you see. [9]

The Court: Is it your point that the factual matters upon which rest the basis of your liability on the part of the Chevrolet Company and the Lawrence Warehouse Company cannot be relitigated in the present suit but only the question of law?

Mr. Garrison: No, I think it can be relitigated in either suit, but because we want to use the transcript and exhibits in the first case, and because Your Honor specifically reserved that cross-claim, you see, it seems to me simply to be a matter of good procedure——

The Court: Of course, the liability of the Capitol Chevrolet Company and the Lawrence Warehouse Company to the Reconstruction Finance Company is res judicata.

Mr. Garrison: Yes, that is true, we do not raise that issue, and that won't be involved. This is merely the liability between Lawrence and Capitol.

The Court: How could you litigate the facts except only to the extent as it concerns the liability of the Chevrolet Company and the Lawrence Warehouse?

Mr. Garrison: That is right. I do not mean to agree with your Honor's comment that it is res judicata. It would be res judicata between Lawrence Warehouse and Defense Supplies, say, but it is not necessarily res judicata as between Lawrence and Capitol. That is a point we need not get into now. Later on we might talk about that. [10]

The Court: The Court found, and the higher

court sustained the finding, that there was a factual basis for liability on the part of both of the defendants and also another defendant, as I remember, the fellow who had the blow torch.

Mr. Garrison: Yes, there is no question about that, your Honor, and that point is not in dispute. The basis for that liability, as your Honor recalls as well as I, was the agency relationship between Capitol and Lawrence under this contract I am just talking about. The Circuit Court of Appeals in its affirming opinion said, "While the findings are not specific in this respect, the trial court's opinion shows that the decision as against Lawrence was grounded on imputed negligence. The facts of the case and the terms of the agency agreement fully support this conclusion."

You see, they were our agent and we are bound by their negligence. Now we are here today seeking in an action indemnification from our agent under two statements of our cause: first, that there is well-known and implied obligation on the part of any agent to so conduct himself that his principal will not be held liable for his negligence; and secondly, under this specific written contract that I have just referred to, in which the Capitol Chevrolet Company agreed to hold us harmless for any loss by reason of their negligence. So that is our case. [11]

The Court: It is really the last condition that you have read that is the basis of your claim.

Mr. Garrison: We are in the fortunate position of having a specific written contract with Capitol, but even if we did not have, the law gives us one,

because there is an implied duty and a liability implied in the law that the agent shall be responsible to his principal for his negligence. But we do not need to worry about that because here it is spelled out in so many words. So there we are. We are now at the point where everything has been introduced, all of these contracts are in the evidence, testimony has been given, and the Court has already ruled on that evidence, to the effect that the fire resulted from the use of the torch. The evidence shows a violation of the instructions by the agent Capitol. And there isn't any issue of fact here today that needs to be tried insofar as our cause of action against Capitol Chevrolet Company is concerned. When we get into the question of the other defendants, we have some other problems, and I think the best way to do it would be for us to consider, first, whether or not we are entitled to a judgment, a summary judgment against somebody.

The Court: Against the Capitol Chevrolet.

Mr. Garrison: Yes, and then let me take up separately the question of my theory of why I think we can hold the others.

The Court: Let me ask you one more question and I won't bother you any more: Would there be any liability on the part [12] of the Capitol Chevrolet to the Lawrence Warehouse absent the indemnification provision in that agreement?

Mr. Garrison: Yes.

The Court: On what theory is that?

Mr. Garrison: Implied in law.

The Court: Liability as an agent?

Mr. Garrison: If I am negligent, you may sue me for negligence. We have a great abundance of authority on that. But we do not need to worry about that because it is spelled out in so many terms.

Now, they have answered our cross-claim here with a multitude of defense, literally and figuratively. They have cited, I think, every statute of limitations in the Code, and I am at a loss to say much about that because I can't conceivably see any application of them. When you have in mind, as we wish your Honor will, that we are seeking recovery by reason of this indemnity arrangement to which we have just referred, that indemnity arrangement, that contract by Capitol was to hold us harmless against loss. Now, we did not suffer any loss until we paid the judgment, and that was when the statute first could conceivably start to run. I believe in their answer they make reference to the fact that the judgment became final back in 1946, probably based on the comment that the Supreme Court made that the original judgment should be the one that was effective. [13]

The Court: In the original suit you had a cross-complaint, too?

Mr. Garrison: Yes, sir.

The Court: In that you claimed if there was liability, it was on their part as agent as well as under the indemnification agreement?

Mr. Garrison: Yes.

The Court: So while the statutory point might conceivably be good in the second suit, it would not be good in the first suit.

Mr. Garrison: Oh, yes, it would.

The Court: I misstated myself. While the limitation point might possibly go good in the second suit, it would not be good in the first suit.

Mr. Garrison: That is right; no, it could not conceivably be good. They also state that we did not state a cause of action, and they also allege that we were guilty of independent negligence, that we cannot recover against our agent because we were negligent independently. There is no evidence of that any place in the record. I would say it is our theory that the case is now at issue and needs no further evidence, and your Honor can decide it on my motion for summary judgment, but I think Mr. Clark should elaborate on his theory that we have not stated a cause of action and on his theory that the statute of limitations applies. I am not able to get any guaranties [14] with that defense. If you think it is wise, if you will consolidate that first cross-claim that was held in abeyance with our present cross-claim so they may be considered by your Honor together and as one action, then that is all I have to say about the subject.

The Court: The Supreme Court certainly made a lot of trouble for the poor trial judge by requiring another suit to be filed in this case.

Mr Garrison: That was completely without understanding, why they had to file a suit on that judgment.

The Court: It is done.

Mr. Garrison: It is done, but your Honor's decision in the case was confirmed by the Circuit Court

of Appeals on the question of the facts. The other thing went off on an entirely different tack, that we were not concerned with in the trial of the case at all.

Does your Honor agree that the first cross-claim and this cross-claim should be brought together for the purpose of consideration by your Honor whenever you get around to it?

The Court: The other side may want to be heard on that. You want to take up that phase of the matter before you take up the question of the other defenses?

Mr. Garrison: It seems logical.

The Court: Is that agreeable with you, gentlemen?

Mr. Clark: If the Court will hear Mr. Archer, who handled [15] this.

Mr. Archer: If it please the Court, in discussing this case, with reference to the background, it is the cross-defendant's position that the judgment in 23171 is the final pronouncement in that case. The pertinent parts of that judgment are as follows:

> "Now, therefore, it is ordered, adjudged and decreed that Defense Supplies Corporation, the plaintiff herein, do have and recover from defendants Lawrence Warehouse Company, a corporation, Capitol Chevrolet Company, a corporation, and V. J. McGrew, jointly and severally, the sum of $41,975.15, together with plaintiff's costs and disbursements incurred in this action, amounting to the sum of——"

whatever was inserted there. It is our position that it was a joint and several judgment.

The Court: That was the original judgment.

Mr. Archer: That is right, in 23171. The pleadings in the present action are brought on that judgment. It is our contention the fact that it was given jointly and severally precludes any recourse to the evidence and the record on appeal or to the opinion. In any event, the record on appeal, the opinion of the Appellate Court, and the opinion of the trial court, while informative, certainly are not part of the record in determining the judgment in the case. Furthermore, if the [16] record in No. 23171 is looked to, it will be seen that nowhere in that record is the question of the liability of the Lawrence Warehouse Company, on the theory of respondeat superior, even discussed. It is not mentioned in the pleadings. Lawrence Warehouse Company filed interrogatories after their motion for a more definite statement was denied, or a bill of particulars, and the first five interrogatories were directed to obtain a definition of what the plaintiff was driving at as to the Lawrence Warehouse's negligence, and in every one of those interrogatories it said "the liability of Lawrence Warehouse as such"—no mention of respondeat superior. As I said, the pleadings state the same thing.

Now, the findings of the Court: I would like to invite the Court's attention to finding No. 5 and finding No. 6. No. 5 reads as follows:

"On April 9th, 1943, defendants Lawrence Warehouse Company and Capitol Chevrolet Company

failed and omitted to exercise reasonable care and diligence for the protection and preservation of said goods so deposited and stored by plaintiff in this, that said defendants negligently permitted the use of said torch on said premises and negligently failed and omitted to see that it was used in a careful manner and to provide adequate protection for said premises and said goods against the use of [17] said torch and maintained said premises and said goods in a negligent and careless manner so as to permit them to become ignited and destroyed by fire. By reason of such negligence and carelessness said premises of plaintiff and said goods were consumed and totally destroyed by fire."

And then finding No. 6:

"The negligence of defendants V. J. McGrew, Lawrence Warehouse Company and Capitol Chevrolet Company concurred and joined together to destroy plaintiff's goods as aforesaid."

There is no finding at all of respondeat superior, scope of the agency, or acting within the scope of the agency.

In this respect I would like to invite the Court's attention to a case of the Ninth Circuit, Rothschild against Marshall, 44 Federal 546. That case was a simple case involving two suits under the Longshoremen's and Harbor Workers' Compensation Act. In the first case the opinion of the District Court had said,

> "In both cases the Deputy Commissioner will proceed accordingly,"

but his decree in the case in which he rendered

that opinion set aside and enjoined the enforcement of the award which was made by the Commissioner. Pursuant to the opinion the Commissioner proceeded to take a second hearing, and then it [18] was attempted to be enjoined again, and on appeal the Court of Appeals for the Ninth Circuit held that there was no jurisdiction, in spite of the language in the Court's opinion for the Commissioner to hold a second hearing. The Court said:

"The short, and we think conclusive, answer to this insistence is that courts in determining the rights of parties in litigation before them speak through their judgments and decrees, and where a judgment or decree is plain and unambiguous in its terms, it may not be modified, enlarged, restricted, augmented, or diminished by reference to other documents, including the opinion pursuant to which the judgment or decree in question is entered. The decree of a court of equity is the final and solemn definition of the rights of the parties to the controversy with which the decree deals, and the decree—not the opinion—is the instrument through which the Court gives expression to its conclusions.

" 'The opinion of the Judge is the expression of the reasons by which he reaches his conclusions; these may be consistent or contradictory, clear or confused. The judgment or decree is the fiat or sentence of the law, determining the matter in controversy, in concise technical terms, which must [19] be interpreted in their own proper sense. It would, we think, be of dangerous tendency to make the force and effect of the most solemn official acts de-

pend upon the various interpretations which ingenuity might suggest to the most carefully considered language introducing them.' "

Now, this case is, as has been followed consistently, and I think that the general rule—I don't think its judgments or findings are like any contract—if they are clear and unambiguous on their face, they can't be counter to the——

The Court: Your point is, Mr. Archer, with the judgment—that was a joint judgment, finding a joint or concurrent liability of negligence on the part of defendants, once the judgment is paid, neither party can pursue the other party.

Mr. Archer: Our relying on the judgment, the pleadings in this case, there is no doubt about the pleadings in this second action relying on the judgment in 21371, that is to say, liability was imposed for that reason, and furthermore, I think the law generally is that that finding in that case——

The Court: Well, would it make any difference in this case, Mr. Archer, that at the time of the litigation of the original suit that there was reserved for future determination the cross-complaint?

Mr. Archer: Well, of course, you are referring —would it make any difference in the second case?

The Court: I mean, would it make any difference with respect to the point you now made as to the judgment that there was reserved for consideration the issue raised by the cross-complaint and that was undetermined in the action in which the judgment was rendered.

Mr. Archer: No, I don't think it would make

any difference because the cases which support this ruling, this ruling of law which I am expounding, are cases where it has arisen in entirely separate actions where an indemnitor wasn't even a party on the first action and the indemnitee comes in and says, "Here is this judgment which I had to pay", and the courts uniformly say, when they look at that judgment and find a finding of negligence on the part of the indemnitee, that the judgment precludes you, you have to rely on the judgment to establish your liability. If there was no judgment rendered, we certainly wouldn't be liable.

The Court: Suppose the original action was only against the Lawrence Warehouse Company?

Mr. Archer: I say it is the same situation.

The Court: Then if there was an indemnitor, wouldn't the indemnitor have a right to—suppose that the Lawrence Warehouse had a contract with the Capitol Chevrolet Company protecting it against any negligence of the agent, and the Government in this case elected only to sue the——

Mr. Archer: That is right. [21]

The Court: ——Lawrence Warehouse Company, and they recovered a judgment against the Lawrence Warehouse Company upon the facts which, in the record, would show that the actual tort was committed by the agent of the Lawrence Warehouse Company; but of course, the agent, not being before the Court, the judgment would be only against the Lawrence Warehouse Company. Would you say that the Lawrence Warehouse Company was liable

because of its tort debar it from relying on an indemnity agreement with its agent?

Mr. Archer: Yes, your Honor, because they have to rely on the judgment to begin with to show any liability. In the same way the indemnitor is bound.

The Court: Suppose the Capitol Chevrolet Company says in the indemnity agreement, "Now, I will protect you against liability as a result of any tortuous act on my part, and if anybody gets a judgment against you I will pay it."

Mr. Archer: That's right.

The Court: Now, judgment is obtained against the Lawrence Warehouse Company, which is based upon a finding that the Lawrence Warehouse Company was guilty of negligence. Would that debar the indemnitee from, the Lawrence Warehouse Company, the right to sue on that indemnity agreement?

Mr. Archer: The agreement, the original agreement did cover negligence of the Lawrence Warehouse Company, or didn't—our agreement covers only negligence of Capitol Chevrolet [22] Company.

The Court: Maybe I haven't made myself quite clear. Let's assume the Lawrence Warehouse Company had made the agreement for the storage of these tires with the Defense Supplies Corporation.

Mr. Archer: That's right.

The Court: They employ an agent, the Capitol Chevrolet Company, and in that agreement they had a provision whereby the Chevrolet Company agreed to hold the warehouse company harmless from any liability by virtue of their negligence and

pay any claim that might be legitimized by court proceedings against them.

Mr. Archer: That's right.

The Court: And the Defense Supplies Corporation then sued the Lawrence Warehouse Company alone.

Mr. Archer: That's right.

The Court: And recovered a judgment against them.

Mr. Archer: That's right.

The Court: Now, wouldn't the Lawrence Warehouse Company be in a position to say, "I have a judgment against me; I have to pay it. Now, under our indemnity agreement, inasmuch as it was your fault in the matter and you have agreed to indemnify me, I want you to pay it."

Wouldn't they have that course of action?

Mr. Archer: That would be their course of action, but they [23] would, nevertheless they would be relying on the judgment to establish it, and our position is that they have to take the judgment for good or for bad.

The Court: Well, it is a judgment against the Lawrence Warehouse Company which they paid.

Mr. Archer: That is right.

The Court: I notice also that there is an assignment of that in this record, that the Government assigned the judgment to the Lawrence Warehouse Company. I don't know whether that has any significance.

Mr. Archer: That's superficial; there are many cases which say—that is just a way of trying to get

a contribution from a joint tort feasor, and the law is contrary on that point. That is mere subterfuge.

The Court: It is your point because the Chevrolet Company was a party to this suit and the judgment was against both of them, that that debars the Warehouse Company from suing on the indemnity agreement?

Mr. Archer: I make both points, your Honor. I would say even if Capitol Chevrolet Company was not a party to this action, that judgment, relied on as it is relied on by Lawrence Warehouse Company, with a finding of Lawrence Warehouse Company's negligence precludes Lawrence Warehouse Company from showing that it was not in fact itself negligent even though——

The Court: I can understand your point if you are relying [24] on the regular orthodox rules about joint tort feasors; in other words, if Smith and Jones are sued, why, then Smith can't turn around afterwards and try to collect from Jones; but is that true, is the case you have cited from 44 Federal Second, would that apply to a case where there was an indemnity agreement? That is what is bothering me.

Mr. Archer: There is a Califorina case precisely on the principle of agent relationship, Salter against Lombardi, 116 Cal. App. 602, and in that case there was a finding in the lower court—incidentally, this case also was a case where they tried to buy the judgment. In this case they allowed it because it was the attorney that bought it, since he was under no obligation to buy it that it wasn't in fact contri-

bution between joint tort feasors, but on the principal point of the respondeat superior.

Well, this was the case in which they said:

"With appellant's basic premise we are agreed that the judgment is one against joint tort feasors. His motion for full satisfaction was made in part upon the record and files of the action. This alys before us the findings of fact upon which the judgment was founded, where it is finally adjudicated, so far as this case is concerned that 'defendants by themselves, their agents, employees and servants' acted so negligently that plaintiff had judgment. [25] In the face of this finding, plaintiff's successor in interest may not be heard to say that the tort was solely that of defendant Lewis, and that Lewis' co-defendants were liable only on the theory of respondeat superior. We must consider the judgment as one against tort feasors."

The Court: I can understand that very thoroughly, but what I am bothered about is whether that applies in the case of an indemnity agreement.

Mr. Archer: There is a leading case on that which covers, I think, all of the authorities that there are, and it discusses it fully. Builders Supply Company against McCabe, 366 Pennsylvania 322, 7 Atlantic Second 368, 1951. That case cites the Restatement of Judgment, Section 107. And I will read the pertinent portion of the restatement because I think it is more concise than the opinion of the Court. Comment on clause "A" and comment "H":

"Findings adverse to indemnitee's claim for indemnity."

"In actions between the indemnitor and the indemnitee, the indemnitee is subject to the burdens, as well as entitled to the benefits, of the rules of res judicata with reference to matters determined in an action brought by the obligee or by the injured person. If the judgment is based upon the [26] finding of fact which if correct would discharge the indemnitor, the latter is discharged from liability to the indemnitee by such finding, unless by agreement the entire defense is controlled by the indemnitor."

And there is no inference or allegation that we controlled the defense.

So that I think is precisely the situation which you were asking me where there is a past judgment and a finding adverse to the indemnitee.

Now, I think that that would preclude any recovery of liability against Capitol Chevrolet because the original complaint—even in the first action, the original action on the cross-claim.

The Court: As to the liability of the Capitol Chevrolet Company, the original defendant.

Mr. Archer: That is right.

The Court: I take it from what you both said, that is wholly a question of law, isn't it?

Mr. Archer: That part in the original case. Now, I would have this additional point to make, that the point your Honor made, the filing of the original action would toll the statute of limitations only for the original action and not for the second action,

and this was a new action which was brought against Capitol Chevrolet Company. [27]

Mr. Garrison has made the point—well, no damage, no loss was suffered. Our point there is very simple, and it is in the record in case No. 23171, the claims in that action, the cross-claim was precisely the cross-complaint that is now asserted, the rules providing that it could be asserted at that time.

I think the final order was in 1947; I believe the action was filed in '45—. At any rate, they could assert a claim then. But our position there is that we denied liability at that time. That denial constituted a repudiation and an election and upon which the suit was filed and the determination made to sue us at that time; while they might not have to sue us at that time, under Federal Rules they could have and under our denial they could have. So while it could apply to 23171, it can't as to this, and I have precise authority on that point, too.

The Court: Well, I don't know that it makes much difference to the Lawrence Warehouse Company whether they recovered on the cross-complaint in the first action or the second one, as long as they recovered.

Mr. Archer: Well, the point is that they couldn't recover against the other defendants in the second action; if they recover only in the first action, they recover only against Capitol Chevrolet Company, which was the only defendant joined in that action. We have additional defendants in the second [28] action as well as Capitol Chevrolet Company. I mean, your question as you stated it——

The Court: That is another question. You're speaking now of this new corporation, Kenyon, and so forth.

Mr. Archer: That is right. I want to say that the statute of limitations inasmuch as Kenyon, 23171, is not before us, and we oppose any motion for consolidation, because we think there are very definite separations there, the judgment in No. 23171 has now become merged, not even a second judgment, and in addition, we have additional defendants, you have separate defendants, and so I think for purpose of consolidation, even the question of evidence as to what would be admissible—Mr. Garrison had reference to the evidence in the prior case which I don't think could be used in the second case. So for that reason we would oppose any consolidation.

The Court: But Mr. Archer, is there any factual question that is involved as between the Lawrence Warehouse Company and the original Capitol Chevrolet Company, or the Lawrence Warehouse Company's cross-demand against Capitol Chevrolet Company?

Mr. Archer: Well, yes, I'd say there is a question of—they allege in the first place many items of loss. Mr. Garrison's position is that they suffered damage, they just paid the judgment, they had these counsel fees in the first action, and so forth.

The Court: Might be ancillary matters, except as to the—[29] Isn't it a question of law entirely?

Mr. Archer: I think a question of, one, I think the question, inasmuch as we denied liability on

the original cross-complaint, that the question of repudiation is there and——

The Court: I don't know what you mean by repudiation.

Mr. Archer: Well, my point is just like an anticipatory breach of contract, the liability is against loss of damage and that the cause of action doesn't accrue——

The Court: You mean the cross-complaint in the original action is anticipatory?

Mr. Archer: That is right. No, I mean by the fact that there was filed and we denied that there was an anticipatory breach so that the cause of action on the indemnity agreement arose then.

The Court: I don't think we would get very far under the Federal Rules on a procedure on that because they favor the more simple application of rules of pleadings in that regard and, of course, the disposition of the complaint in all its aspects where it is possible.

Mr. Archer: I agree with that. They could file, and the fact that they filed that claim and we denied it, if there was an obligation to indemnify at that point, we repudiated it, and that repudiation was an anticipatory breach, causing the cause of action to accrue at that time.

Now, if that presents any more than is contained in the [30] pleadings—I think it is shown in the pleadings—if it contained any more than in the pleadings, then it is a factual question.

The Court: That isn't very much of a question of fact, the fact that all the defendants came in

and very vigorously defended the action and claimed nobody liable in the matter.

Mr. Archer: I agree with your Honor, I don't see that there is a question of fact; the question of anticipatory breach is before us on the record.

The Court: It seems to me offhand—I am not attempting to force you gentlemen to agree to anything you don't want to agree to—that the question as to liability of the Capitol Chevrolet Company to the Lawrence Warehouse Company in either or both of the cases is really a question of law, except as to those items you mentioned, respecting the attorneys' fees or expenses.

Mr. Archer: Well, I think, as I say, I think if you decided in the second case you will have to decide the question of the statute of limitations.

The Court: It is still a legal question.

Mr. Archer: Well, in the second case, yes, it is a legal question; that's right, your Honor. Then the proof of the various items you have is the only factual consideration on that point. [31]

The Court: I was thinking that in that aspect that you might very well submit, both sides, either further argument or on motion.

Mr. Archer: I think we would be willing, the Capitol Chevrolet Company.

The Court: Would you be willing?

Mr. Garrison: Yes, certainly, your Honor.

Mr. Archer: Certainly. If you determine in favor of Capitol Chevrolet Company in the second case, it would eliminate any further case, so it wouldn't be worth while, and save time——

The Court: Now, you have another question.

Mr. Garrison: Well, I think on this question I have an affidavit here, of an officer of the Lawrence Warehouse Company.

The Court: Before we come to that, how would you determine this question of the liability on these various additional items that Mr. Archer——

Mr. Garrison: I have an affiavit of an officer of the Lawrence Warehouse Company on the expenses and amounts of money paid, and under our rules the motion for summary judgment this affidavit may be received, as I understand it, and they may——

The Court: Anything controverting——

Mr. Garrison: That raises the issue of those items, [32] what those items are.

Mr. Archer: Are the dates on there?

Mr. Garrison: I assume so; if not, we will give them to you; provide an affidavit in which the dates are shown, if they are not shown.

Mr. Archer: Obviously we cannot make an affidavit on this subject, can't have a counter-affidavit on this.

Mr. Garrison: Evidence to be introduced, and if we introduce it at the time of trial——

Mr. Archer: We will reserve our action on that until we take a look at it. We can probably reach an agreement on that, your Honor.

Mr. Garrison: That is a detail.

The Court: You can reach an agreement as to the facts themselves without necessarily conceding

that they are recoverable or that they are not a recoverable amount.

Mr. Clark: If the Court please, your Honor is not permitting the affidavit to be introduced in evidence?

The Court: Well, the affidavit may be filed, and then you can either file a counter-affidavit, if you wish to, or make an objection to the affidavit, or come to an agreement as to the facts, whichever way you wish.

Mr. Garrison: If we don't get together on the facts——

Mr. Archer: We would just have to take further procedure. [33]

The Court: I am permitting it to be filed, but with the right of the other side to take whatever action they wish.

Mr. Garrison: I agree with your Honor the question of the liability of Capitol Chevrolet Company and of James A. Kenyon can be decided by your Honor now on the law, because Mr. James A. Kenyon, in his answers to our interrogatories, which will be filed, admits that he assumed from the Capitol Chevrolet Company, when it was dissolved, its liabilities. Then if this turns out to be a liability of Capitol Chevrolet Company, then he agrees that he has assumed that liability.

The Court: Would that be stipulated?

Mr. Garrison: You agree with that?

Mr. Archer: Well, Mr. Kenyon has a separate defense on the statute of limitations. Your Honor remembers in the first action he testified at that

time that Capitol Chevrolet Company had been dissolved and that its assets had been transferred and that he was the owner. I don't have the certified transcript with me, but it would be my position that I would put that in evidence to show that the Lawrence Warehouse Company was on notice at that time and the transfer and statute began to run at that time to set aside any transfer.

The Court: Let us protect your rights in this way: Would you stipulate that if the Capitol Chevrolet Company is determined to be liable that Kenyon would be liable under his agreement, subject to the validity of any defense he might have on [34] the statute of limitations?

Mr. Garrison: Question of law.

The Court: Just trying to save you gentlemen having to present proof.

Mr. Archer: Yes, the contract is valid, no doubt about that.

Mr. Garrison: I just want to cover this one point again that counsel makes that, as I understand his statement, that the position that this finding here precludes a recovery by Lawrence against Capitol notwithstanding the fact that that liability arises only because of the doctrine of respondeat superior and because of the negligence of Capitol.

Now, the answer to that question is found in the finding itself. It says in finding 5, which he read:

"On April 9th, 1943, defendants Lawrence Warehouse Company and Capitol Chevrolet Company failed and omitted to exercise reasonable care and

diligence for the protection and preservation of said goods so deposited and stored by plaintiff in this, that said defendants negligently permitted the use of said torch on said premises * * *"

We weren't within 100 miles of that place.

The Court: Mr. Archer's point, Mr. Garrison, is that all these findings show is that defendants were guilty of negligence. [35]

Mr. Garrison: Right.

The Court: And he says you can't look to the opinion or reasons of the Court to determine whether or not that liability was based upon, what theory it was based upon, whether respondeat superior or not, and all you have is a judgment that both of the defendants committed negligence.

Mr. Garrison: It is perfectly consistent with an interpretation that it was based upon the doctrine of respondeat superior, couldn't be based upon anything else, because the negligence on which the liability was based was the action of the agent, so it would be consistent with the findings. It would be inconsistent with the English language to say——

The Court: No mention about that, all the judgment says is that——

Mr. Garrison: Here's what the judgment says: that both defendants are liable because the agent was negligent.

Mr. Archer: It doesn't say "agent."

Mr. Garrison: Just a minute, please. Both defendants are liable because the Capitol Chevrolet Company permitted the torch in there.

The Court: That is true.

Mr. Garrison: That is true.

The Court: That is the conclusion, but the judgment that I read from doesn't say that, that is the point.

Mr. Garrison: Well, I submit the case on the finding, [36] because you couldn't read that finding any other way than to find from it that the negligence of Lawrence was based upon the doctrine of respondeat sperior, because the act was the act of the agent.

The Court: I think you better submit some authorities on that. I don't know that I am necessarily convinced by Mr. Archer's argument, which is ingenious, and apparently has some weight behind it, but his point is clear that the judgment is only against the defendants and therefore, by the judgment, they were joint tort feasors and then that precludes one from recovering against the other. That is what he says, only can look to the judgment.

Mr. Garrison: I agree, we don't desire to impeach the judgment, we don't desire to explain the judgment, and we only have to look at the judgment and we see, when anyone reads that judgment, they will find that the liabilities, it is stated as being jointly liable, the Lawrence Warehouse Company couldn't be liable under any other doctrine, because the acts here were the acts of the agent, and nothing inconsistent in that finding with that result.

The Court: Well, I think so far, then, up to the point of the claim, cross-complaint against the

Capitol Chevrolet Company and Kenyon, subject to the two reservations that we made, we have a question of law.

Mr. Garrison: That is right. [37]

Mr. Archer: Correct.

The Court: What about these other defendants, other companies?

Mr. Garrison: I will take that up. First I would like to ask of these gentlemen——

The Court: Are you going to remain over tomorrow?

Mr. Clark: Yes, sir.

The Court: Well, I think—I have been in a jury trial since early this morning and I think I ought to allow you sufficient time and I think if we do we may be able to get this matter in shape so that it may be submitted to the satisfaction of all parties here.

Mr. Garrison: Fine.

Mr. Archer: Fine.

Mr. Garrison: About what time?

The Court: I thought that if I continued it until tomorrow at two o'clock, we would have ample time to complete the whole matter and perhaps even work out a pre-trial order in the matter that would protect both sides and that would delineate the precise issues of the case so that we would know just which way we are going. Is that satisfactory to you? I will continue it until tomorrow at two o'clock.

Mr. Garrison: Thank you.

Mr. Archer: Fine.

(Whereupon an adjournment was taken until January 9, 1952, at 2:00 p.m.) [38]

January 9, 1952

The Clerk: RFC versus Capitol Chevrolet, further pretrial conference.

Mr. Archer: Ready for the cross-defendants. Your Honor, I have one or two points on the first question which we went through yesterday, not a reargument, just a clarification of the issue, that is, the submission of the question of the liability of Capitol Chevrolet Company, the original company, that is. Our tenth defense, and the tenth defense of Capitol Chevrolet Company, which is the effect that Lawrence Warehouse was equally, jointly, and contributorily, negligent, or any of them, and acquiesced in or consented to the negligence of Capitol Chevrolet Company, if any there was, we contend that that is an issue of fact to be reserved in the submission. The Court would still decide, if it takes the view which I advocated yesterday, that the former findings and judgment are binding on both Capitol Chevrolet and Lawrence Warehouse. If it takes that view, then that would result in a summary judgment in favor of Capitol Chevrolet Company.

The Court: Why would that be?

Mr. Archer: As I say, they take my construction that Lawrence Warehouse was negligent, independently negligent; unless that point has been decided, then there are no other issues. [39]

The Court: Of course, unfortunately, I tried that case and I could not conscientiously come to

that conclusion because the facts were that the Lawrence Warehouse Company had employed the Chevrolet Company as agent to do the warehousing.

Mr. Archer: I understand that your Honor might have some reluctance to come to that, but our point is that the findings and the judgment preclude any other regardless of what the facts in the case may have been that are now consummated in the findings and the judgment.

The Court: Suppose you had a trial on that issue of fact: how could the Court come to any different conclusion than it came to at the trial?

Mr. Archer: Oh, then we are raising the additional issue here that they acquiesced in whatever negligence we did. Specifically, one of the items of negligence is there was not sufficient fire protection for the Ice Palace and it would be our contention in the trial of that fact that the location of the Ice Palace was known by Lawrence Warehouse and consented to by them. That is, I believe, a typical offense in an indemnity-principal relationship, that if the negligence of the agent was acquiesced in and consented to by the principal, that there is no indemnity. I simply want to reserve that defense, which I do not think is covered in the findings in the prior case, that is, apart from the separate and independent negligence of Lawrence Warehouse Company. [40]

The second point I wanted to make was in the pleadings there was no mention made that Lawrence Warehouse gave notice of the first action, gave notice to Capitol Chevrolet Company to de-

fend, and offered them the opportunity of managing the defense, the typical thing in an indemnity situation, and there is nothing in the pleadings about that. I think that might raise a question of fact. As you know, neither counsel from Los Angeles or our firm was in the first case, and I do not know what the facts are.

The Court: That Capitol was represented by counsel in that case?

Mr. Archer: I was referring to Lawrence Warehouse giving notice and the opportunity to Capitol Chevrolet to manage Lawrence Warehouse's defense.

Mr. Garrison: We sued them.

Mr. Archer: I mean the defense against the Defense Supplies Corporation. I think it is a typical situation between indemnitor and indemnitee. When the indemnitee is sued, he gives notice and opportunity to manage the defense.

The Court: I do not think much of that point. Both defendants were in court. Both vigorously defended the action and acted together in the matter.

Mr. Archer: There is the item of costs and attorneys' fees. I would say if we are not given an opportunity to defend, if they manage the defense, then they cannot throw over the [41] cost they incur independently on us. There is no allegation in that regard in the complaint or no averment and to take it as it stands now, we would argue if it were submitted without such an averment, we

would not be liable. I think if we went to trial under federal pleadings, certainly Lawrence Warehouse Company could show there was notice. I wanted to remove any question. I did not want to be arguing contrary to the fact when it was submitted.

The Court: Your point there is it affects the right to recover and the amount of costs and attorneys' fees is affected by that?

Mr. Archer: That is right, and so some extent the degree of proof of the judgment. But I do not think there is any question about the attorneys' fees and the costs independent of that. I am willing to let it go in the allegations, the averments as they are, but if it is contrary to the fact, that is up to Mr. Garrison. He undoubtedly knows what the fact is on that. And in regard to the same thing, the attorneys' fees and costs, in the affidavit which was submitted I wanted an itemization of each date, the date that each cost or attorney fee was paid, with the idea that if it accrued four years prior to the action, it is barred. And in the same light, when we speak of submitting these questions, I am sure it is understood Lawrence Warehouse would move for summary judgment on the liability of Capitol Chevrolet Company, both [42] Capitol Chevrolet Company and Kenyon and Capitol Chevrolet Co. would move for summary judgment on the same issue, so it would be a mutual judgment in that case. But that is all that I have on that first point.

The Court: Before you sit down, Mr. Archer, have we reached the point or not as to whether or not the liability of the Capitol Chevrolet Company

and Kenyon on a cross-complaint may be determined on pre-trial or not?

Mr. Archer: I would say this: I would put it this way, that the issue of the liability of Capitol Chevrolet Company on the cross-complaint of Lawrence Warehouse Company in No. 30473, the present action, is to be submitted save and except the issue raised by the tenth defense in the first amended complaint, which he reserved for trial on the merits, if necessary, and the tenth defense is the one I mentioned when I started here about acquiescence.

The Court: I think I have that in mind.

Mr. Archer: The issue of the liability of James A. Kenyon on the cross-complaint of Lawrence Warehouse, 30473, to be submitted save and except the issues raised by the defense of the statute of limitations, and again the tenth defense in the first amended cross-complaint, which reserved for trial on the merits if such became necessary.

The Court: What would be the result of that sort of stipulation? What could the Court decide on the pre-trial? [43]

Mr. Archer: It would be precisely as if Capitol Chevrolet Company, Capitol Chevrolet Co., and James A. Kenyon moved for summary judgment on the basis of the judgment and findings in the prior action, on the ground that it was there determined that Lawrence Warehouse Company was negligent, and so is not entitled to indemnity, which would preclude, and if the Court decided that in favor of the cross-defendants, there would be no

further issues in the case as to any defendant.

The Court: What you are really saying there is that all the Court could decide on the pre-trial would be a judgment in favor of your client, that if the view of the Court was the other way, there would have to be a further hearing in the matter.

Mr. Archer: That would be true on the statute of limitations in any event, as we decided yesterday, except Mr. Kenyon, and it would give us only the tenth defense, which I said was as to a trial on the merits.

The Court: I do not see much ahead then in the way of accomplishing anything on pre-trial, because I do not see what good it is going to do to submit the matter as if it were a motion to dismiss. That is what you are really saying.

Mr. Archer: Or a motion for summary judgment.

The Court: What you are really saying is I could grant a motion for summary judgment in favor of the Capitol Chevrolet Company on the present state of the record, but I could not [44] amend a motion for summary judgment in favor of the Lawrence Warehouse on the present record because, to do that, we would have to have a further hearing on the facts.

Mr. Archer: There is a factual issue there. I do not see how you could do it without eliminating the tenth defense. I will be perfectly frank. I think the motion to dismiss it would be good.

The Court: Then I think the best thing to do under those circumstances would be to put it down

for a trial date so that we can finally dispose of it. I do not see much use of us continuing with the pre-trial. I know all about this case. It has quite a history to it. I do not think I need any pre-trial in it unless in the pre-trial we can accomplish the submission of the case. That was the thought I had in mind. I am not attempting to force either side to do that or even suggesting that you should do that. After all, you have to decide what you are going to do with your own case. But the purpose of this meeting was really to determine whether or not we could submit the case for decision in pre-trial, and if we cannot do it, then we can't do it. We can't accomplish the impossible. We have to try it, that is all. It would seem to me that is the result of what you said, Mr. Archer, unless I do not quite get everything you say.

Mr. Archer: I agree, your Honor, that is precisely what I said. The reason I brought it up was ordinarily in pre-trial [45] we define the issues of the trial. I came prepared yesterday to define the issues.

The Court: I know what the issues are.

Mr. Archer: The second thing is Mr. Garrison moved for summary judgment, and I do not see how summary judgment in any event could eliminate our tenth defense, because that was not even encompassed in the prior proceeding at all. It was then that I moved for summary judgment because I do think the case at this stage can be decided against Lawrence Warehouse without raising any question of fact. I do not see how it can be decided

against the cross-defendants without raising a question of fact.

The Court: I thought yesterday all that was going to be reserved was some question about attorneys' fees, and that that was the only question of fact that would require any trial. But now it appears from what you said there is this other matter.

Mr. Clark: It is all in the pleadings. I wonder if I might interpose for a second. Perhaps from the standpoint of a bystander I could state our position quite succinctly. Our position is simply this, that there is only one thing that the Court can do in this case, without committing error. I say that, of course, with complete deference for the Court. The action in this case is brought upon a judgment. That is what the cross-complainant is suing upon. He cannot take part [46] of that judgment and refuse to take another part. He has got to take that judgment, the burdens and the benefits. One of the burdens of the judgment is that it found the cross-complainant concurrently guilty of negligence with the cross-defendant, and if your Honor will examine the authorities, I submit with complete deference, your Honor will find that that is the rule of law, and that will end the case. In that aspect of it, Capitol Chevrolet Company, I submit, is entitled to summary judgment and the case is over. That is all there is to it. These other issues of fact are in the pleadings and we can't lay them, because we do not know what your Honor is going to decide on this first issue.

The Court: I suppose under those circumstances

it would be better to save everybody's time to have the trial of the matter and determine that issue along with the others, and if you win, you win anyhow. I do not suppose you care particularly how you win on the matter. And then the Court would not be confronted with the situation that if it denied your motion for summary judgment, we would still have to have another hearing of the matter. We might as well dispose of the whole case.

Mr. Clark: I think that would necessarily follow. There would have to be another hearing. But still in the interest of expediting the trial and saving the Court's time and counsel's time, it would seem to me an advisable thing to do [47] would be to pass on this first issue in advance of the others. I believe your Honor will find the whole thing will be over. I do not say that purely argumentatively. I think it is a sound position.

Mr. Garrison: I agree that is a question of law, and we are perfectly *willing* to have the question of law submitted. If they believe that they have some evidence of negligence on the part of Lawrence Warehouse, they could submit that by affidavit in this pre-trial, and maybe we would not even dispute it. It is true there was not any contention made in the first trial that Lawrence Warehouse was negligent, and I do not believe there will be evidence ever introduced in this case that Lawrence was negligent, but it could be very limited at most, and if they want to submit it by affidavit, it is perfectly proper in a pre-trial conference.

The Court: Your view is if the Court were to

deny Capitol's motion for summary judgment, there would not be very much to stand in the way of the judgment from the factual point of view in favor of the Lawrence Warehouse Company.

Mr. Garrison: That is right, and if they have some item of fact which they think bears upon Lawrence's conduct in the matter, it could be set forth in affidavit form, in this pre-trial. I have no objection to going ahead with the trial, but we are going to end up with five minutes' testimony and submit the case on the law. That is what we are actually [488] going to do, and make some more arguments and file some briefs. I agree with your Honor if they do not want to submit it on affidavits, I suppose they are entitled to have their question of fact heard, and we have no objection to that.

The Court: What do you think of the idea of submitting the respective motions for summary judgment now?

Mr. Archer: Yes, your Honor, I think that would expedite the case.

The Court: What is your thought on that?

Mr. Archer: That would be a nice arrangement for them. I have no objection to that. That gives them the privilege of having their cake and eating it, too. They have a situation where they have nothing to lose and everything to gain. I am so confident of the law with respect to that I am perfectly willing to do it. But you have nothing to gain by it.

The Court: If their motion for summary judgment is denied, what would be left would be very

little for the determination of the case. Do you all agree to that?

Mr. Archer: Mr. Garrison is probably closer to the facts than we are. If he says that, that is probably true.

Mr. Garrison: You ought to know. If you have some negligence on the part of the Lawrence, you ought to know what it is now.

The Court: I couldn't really decide the motion for summary judgment on behalf of Lawrence Warehouse without having [49] additional facts.

Mr. Archer: Correct; I think the big issue in the case would be met if a decision was made on the motion for summary judgment by Capitol Chevrolet Company and Kenyon.

The Court: If that motion were denied, there would be very litle left in the case.

Mr. Archer: Yes, your Honor, except with the other parties. A new party has been added to the case.

Mr. Garrison: There is this much to be said: these interrogatories that have been answered disclose a new party having assumed the liabilities along with Kenyon, and so it becomes necessary that we bring that party in. It is the Adams Service Company, which is the corporation of which Phelps, the present head of the Capitol, was formerly identified with. So we have got to bring that company in anyway, and that being the case, if you want to finish it all up at one time, maybe we had better set it down for trial on some date.

Mr. Archer: Your Honor, the motion of Kenyon

and Capitol Chevrolet for summary judgment is like any motion to dismiss where reference is made to additional matters, and like any other motion, you have a person who wins and one who loses. You go ahead and answer or go to trial. While we were perfectly willing to go to trial on Tuesday, because we think this is the principal issue in the case, and I think certainly most of the questions as to the transference would be answered [50] in the interrogatories, I do not think we have any objection to the type of answers here received. We have had full answers to everything that has been asked. I think we can stipulate to most of them.

Mr. Garrison: There has been a failure to answer some points, but that is beside the point.

Mr. Archer: There will be no question there.

The Court: What you are trying to do is this: assuming you get judgment against the Capitol Chevrolet Company and Kenyon, you want a further judgment against the transferee.

Mr. Garrison: That is right. We seek to follow the assets of the first corporation.

The Court: Can you do that in this proceeding?

Mr. Garrison: Yes.

The Court: You have authority for that?

Mr. Garrison: Yes, very clear authority. The assets of the first corporation are trust assets upon the dissolution of the corporation. They were very substantial, in excess of $100,000. They were taken by a partnership, and the cases are very clear that once that dissolution occurs and the stockholders take the assets, they become trustees, and that

property is in trust, property in favor of any creditor, and you can trace that trust property in the same way that you can trace any trust property.

The Court: I am familiar with that. What I was wondering [51] about is can you do it in the original action?

Mr. Garrison: Yes, because we are entitled to judgment against anyone who has those trust properties in their possession, provided they are not bona fide purchasers without notice, and that is not the case here.

The Court: In the same action?

Mr. Garrison: Yes.

The Court: In the principal action?

Mr. Garrison: Oh, yes, very clearly.

The Court: Yes. Will that be controverted factual matter?

Mr. Archer: One step has been skipped by Mr. Garrison and that is the stockholders of Capitol Chevrolet Company assumed the liabilities. There was no fraudulent transfers or anything. There was a contractual arrangement there. So I think that is the end of it. You have a perfectly valid transfer and an assumption of liabilities by the two stockholders.

The Court: There is no question involved there. If you lose in this case, the judgment would have to go against these defendants.

Mr. Archer: Yes, against Kenyon, and the only question is the statute of limitations.

The Court: The statute of limitations against the other defendants.

Mr. Archer: That is right. [52]

The Court: Besides your other points.

Mr. Archer: That is right.

Mr. Garrison: All questions of law.

The Court: Except that you would not have any factual question except the legal question of the statute of limitations.

Mr. Archer: That is right.

The Court: While I appreciate Mr. Clark's suggestion, I think I would feel the same way about it if I were the advocate sitting down there, I would like to get my motion decided first; there seems to be so little the Court has to decide here, we might as well dispose of it all at one time.

Mr. Clark: Your Honor, the Adams Service Company is not represented nor its counsel. We do not represent it. Nobody at this counsel table represents it. It is a new party to this action. Nobody knows how long it is going to take to get Adams Service Company represented. I do not know whether counsel wants to take depositions.

The Court: Are they named as the defendant?

Mr. Garrison: We are asking permission to name them. We just learned about them last week when the interrogatories were answered. But that corporation was formerly supervised by Mr. Phelps. Mr. Phelps was connected with Adams Service for many years, and he is now president of the Capitol Chevrolet Company. [53]

Mr. Clark: If your Honor please, that is not the point. The question is whether Adams Service Company is represented by counsel. I may repre-

sent a man generally, but still have no right to represent him in litigation unless he told me.

Mr. Garrison: We propose to bring them in.

The Court: You have not brought them in yet?

Mr. Garrison: No, I just learned about them last week.

The Court: The only defendants before the Court now are the original Chevrolet Company, Kenyon and the present corporation?

Mr. Garrison: That is right.

The Court: The surety company is out?

Mr. Garrison: That is right.

The Court: At the present time you are asking a judgment against the original Lawrence Warehouse Company and Kenyon——

Mr. Garrison: The original Capitol.

The Court: The original Capitol and Kenyon?

Mr. Garrison: And the present corporation.

The Court: On the ground that Kenyon assumed the obligations of the Lawrence Warehouse Company, and then you are asking additionally for a judgment against the new Capitol on the ground they are the successors of any interest with obligations to pay. You are going to bring in somebody else besides?

Mr. Garrison: We are going to bring in another corporation that assumed the liabilities along with Kenyon. Let me tell [54] you the story as disclosed by the answers to the interrogatories. First incorporated in 1942 there was the Capitol Chevrolet Company, a corporation, half owned by James A. Kenyon, and half owned by Adams Serv-

ice Company, a Nevada corporation. On May 31st, 1944, that corporation was dissolved. The assets were bodily, in bulk, transferred in title half to James A. Kenyon and half to Adams Service Corporation. Adams Service Corporation at that time was headed up by Mr. Phelps, I believe, by Mr. F. Norman Phelps. That partnership continued until April 10th, 1946.

The Court: The partnership between the corporation and Kenyon?

Mr. Garrison: Continued and operated the business just the same as it had before, the same place, the same assets, and then five days before this judgment was signed, a new corporation was formed, the present Capitol Chevrolet Co. Mr. Kenyon and the Adams Service Corporation transferred all of the same assets to the new corporation and stock was issued then, approximately one half to Mr. Kenyon, part in a trust for us at that time, part into a partnership, Jak Co., wholly owned by Mr. Kenyon; the other half of the stock was issued to Mr. F. Norman Phelps and his wife, the man who had been identified with the Adams Service Co. That was a very convenient arrangement, apparently, for a while, until gradually the stock of Mr. Kenyon began to be transferred out of his trust [55] for his daughter in the Jak Co. Company until December 1949. Mr. Kenyon in trust for his daughter. And the Jak Co., his wholly owned subsidiary corporation, appeared to have no interest whatever in the present Capitol Chevrolet, and it is all owned now by this Mr. Phelps, who

was formerly the Adams Service Co. So we have that change and course of transfers.

The Court: What difference would those transfers in stock make if the present Capitol Chevrolet Co. has in fact all the assets?

Mr. Garrison: It doesn't make any. It was intended to have the effect of relieving Mr. Kenyon from his assumption of liability, because what happened, you see, is that they dissolved the corporation; Mr. Kenyon and the Adams assumed the liabilities, you see, theoretically relieving the corporation of its liabilities, putting them in the hands of an individual, and then gradually over the years the individual ends up with nothing. So that if the transfers had their intended effect, we would have no solvent person to whom we might look for the assumption of the liabilities, because there is nothing appearing in the name of Mr. Kenyon at this moment, nor is there anything in the Adams Service Co. at this moment. It is all in the name of other individuals, you see. So that is the problem we have. As a matter of fact, Mr. Kenyon now resides partially in Mexico.

The Court: But the same Capitol Chevrolet Company is [56] still in existence?

Mr. Garrison: Exactly. All the assets are there. The business is being conducted in the same place.

The Court: On the theory of following those assets, you are asking for a judgment against them?

Mr. Garrison: That is right, because it is in effect the same corporation, and the Mr. Phelps who took the stock out of these transfers had full knowl-

edge of the obligation assumed by Adams, because he was a part of Adams. He was Adams. So he is not a bona fide purchaser. We expect the Court when it gets into that will see that all those transfers, whatever they might have been, had no effect upon these trust funds and the people for whom this trust was created, because the Court looks very jealously to transactions of that kind, and the cases say that particularly where one man is predominant in a corporation's affairs, and these transactions occur, then there is some suspicion, more suspicion than ever, upon the circumstances if it ends up with no one liable, and furthermore, the burden is upon Mr. Kenyon to explain to your Honor's satisfaction that these transactions do not have the effect of leaving the creditors without any place to look.

The Court: Is there any doubt about the ability of the present Capitol Chevrolet Company, if a judgment is rendered, to respond?

Mr. Garrison: Oh, no, it is very solvent. [57]

The Court: Then what do you need the defendants you just mentioned in the case for?

Mr. Garrison: Well, they assumed the liabilities and we ought to name everyone who has anything to do with it.

The Court: I just do not quite see from your discussion why there is any legal requirement or necessity for adding Phelps and this other company you mentioned. What was the name of it?

Mr. Garrison: Adams Service Company.

The Court: Adams Service Company, when you

still have the corporation which succeeded to the assets under this guaranty of the payment of liabilities in existence with those assets.

Mr. Garrison: Remember now, your Honor, that the present Capitol Chevrolet Co., the corporation that has the assets, did not ever itself assume the obligations.

The Court: No, but you have told me that the two stockholders of that company who had guaranteed the assets and received them from the original company, turned them over to the present Capitol Chevrolet Company and became stockholders of that company.

Mr. Garrison: Yes.

The Court: They have since, as you have said, parted with some of their stock.

Mr. Garrison: The Adams Service did not show up as a stockholder in the present corporation. They faded out of the [58] picture when the new corporation was formed and Mr. Phelps arrived on the scene. I have not yet shown that Mr. Phelps was Adams Service. I think that is a fact, and I think at this pre-trial conference we are entitled to ask them if that is not the fact, that Mr. Phelps was the Adams Service.

The Court: It looks to me like the principal legal question in the case is the one that Mr. Archer poses and once that is determined the rest of it is not too difficult.

Mr. Garrison: That is right.

Mr. Archer: That may involve some time. I suppose you propose to take depositions?

Mr. Garrison: We are going to try to take depositions. Whether we can locate Mr. Kenyon for that purpose when he gets out of the hospital I do not know. We had a hard time serving him with this notice. We traced him all over Mexico and California and finally got him up at Tahoe. I think this, your Honor: counsel makes a considerable point here of his legal proposition about your Honor being forced to construe the findings differently than the facts warranted they should have been drawn. I do not believe that is going to be the result, but they make a point of that. I am perfectly willing to submit that on briefs to your Honor in advance of any trial date.

The Court: That is what you have in mind?

Mr. Archer: Yes, your Honor. [59]

Mr. Garrison: You can submit it under the head of summary judgment, motion to dismiss, submission of arguments on exceptions of anything you like. I don't care.

The Court: That could be submitted on the cross-defendant's notice for summary judgment.

Mr. Archer: Correct.

The Court: And leave that matter for the time of trial.

Mr. Garrison: That is fine. It wouldn't make any difference.

The Court: Why don't we fix a time for the submitting of this motion and also for the time of trial?

Mr. Garrison: Why don't we submit both motions?

The Court: We can, but you say you have some additional evidence to present.

Mr. Garrison: No.

The Court: You did with respect to some of these defendants.

Mr. Archer: There is that question of fact.

Mr. Garrison: No, everything I have is in the interrogatories.

The Court: You are talking only about the original Capitol Chevrolet and Mr. Kenyon on your motion for summary judgment?

Mr. Garrison: No, I would like to submit it as to all of them—I mean on the three. [60]

The Court: But you have to submit something in support of your motion with respect to the other defendants.

Mr. Garrison: Well, we won't make a motion with respect to them. My motion goes only to the three.

The Court: In other words, you are willing to submit at this time only a motion for summary judgment as to the original Capitol Company and Kenyon.

Mr. Garrison: And the present corporation, who is a defendant in this case.

The Court: Of course there, as to that present corporation, wouldn't you have to have some factual support for your motion?

Mr. Garrison: No, the written interrogatories set forth those transactions.

The Court: You think there is sufficient in the record on that?

Mr. Garrison: Yes.

The Court: All right. Then you gentlemen both submit your motions for summary judgment.

Mr. Garrison: And we will brief the question.

The Court: I think that the main question is the question of whether or not Mr. Archer's client can succeed on his motion for summary judgment. If he can, that puts an end to the case.

Mr. Archer: Yes, on the motion—— [61]

The Court: If he can't, then I have to consider your motion for summary judgment, and there I might have some little difficulty in deciding on a motion for summary judgment, if there is any controversy as to facts. You know how the Court of Appeals has ruled here on these motions for summary judgment. I have had by fingers burned a couple of times about it and so I am rather cautious about it. I mean by that I look at a record on a motion for summary judgment. I can't see any conflict on it. It is argued to me and then some learned colleague of mine goes through the record with a fine-tooth comb and finds where somebody at page 72 said something and says, "Well, a factual question can lurk in this matter."

Mr. Garrison: We do not want a judgment that won't stand up. I would rather go through a day of ordeal in court listening to a claimed negligence rather than running a risk.

The Court: I think the main legal questions—and I do not want to persuade you to do what you did not intend to do—but the main legal questions could be submitted on the Capitol Chevrolet's mo-

tion for summary judgment and on your motion for summary judgment as against the original Capitol Chevrolet Company and Kenyon, because there you really have no disputed question of fact.

Mr. Garrison: That is fine.

Mr. Archer: We do have that statute of limitations point, your Honor, that I mentioned was in the transcript. [62] I believe Mr. Garrison has been trying to paint a picture here. As I brought to your Honor's attention yesterday, if this went to trial we would put in evidence the fact that Lawrence Warehouse was put on notice of all these transfers.

The Court: Submit an affidavit in that regard. You would have to submit an affidavit to see whether or not it is controverted. If it is controverted as to that aspect of the matter, then I could decide it.

Mr. Archer: Maybe it would not be controverted.

Mr. Clark: Maybe counsel can in open court agree on certain portions of the reporter's transcript of the prior trial and prevent the necessity of submitting an affidavit on either side.

Mr. Garrison: I think your Honor has the reporter's transcript at your disposal, without our submitting it.

The Court: You will have to point out what you want.

Mr. Archer: It is not in this case. It is hearsay.

Mr. Garrison: It is not hearsay at all. Let us put ourselves back to the conclusion of the original action by Defense against these two people. There were then present cross-complaints by Law-

rence and also cross-complaints by Capitol against McGrew pending in that action. Do you mean to say your Honor could not have in mind the evidence that went into the original case in considering the cross-claims in the same case, or could not call the reporter up for his transcript, or have [63] it written up or anything else you want to? We are in those cross-claims just as though the case had been finished yesterday and we were starting on the cross-claims with separate findings and a separate judgment.

The Court: That is true as to the first case.

Mr. Garrison: Certainly, and their position at this point is to me most novel because they stipulated at that time those cross-claims could be held over and determined at a later date. How can they stand here now and say, "We won't permit you to think about the evidence in that case because it was some time earlier"? That is in conflict with everything that was done by their predecessor counsel. They are bound by it.

Mr. Archer: Your Honor, this is the second case. If that was an issue in the first case, we have a final judgment on it. The final judgment says nothing about it. The final judgment would have merged the cause of action if that were true.

The Court: I do not follow that.

Mr. Archer: If that evidence in the first case were submitted on the issue in the cross-complaint, then the cross-complainant's action merged in the judgment. If it was not submitted on it, it was hearsay.

Mr. Garrison: It was reserved by agreement of counsel.

The Court: We would have to look at the transcript. [64]

Mr. Archer: I think that is largely academic. This is the second case; we are not in the first case.

Mr. Garrison: Oh, yes, we are. We have two actions pending here, the cross-claims in that case and the present new suit filed naming additional defendants, and I asked your Honor the other day to put them together so all issues could be determined at one time. There is nothing mysterious about that.

The Court: I do not see why you are concerned with litigating the matter in the second case at all.

Mr. Garrison: Because I think I am going to have a hard time collecting anything from the Capitol Chevrolet Co. They are out of existence. I think Kenyon has transferred out of himself and into trust and other corporations everything he has. He has moved to Mexico. I do not believe I can ever collect from Kenyon or the Capitol Chevrolet.

The Court: You can do in the second case everything you did in the first case.

Mr. Garrison: We have a new party in the second case.

The Court: You can name the party in the first case.

Mr. Garrison: It is an individual. They filed suit on the judgment. We paid it, and after we paid it, we have a new set of facts to allege.

The Court: I am not saying what you should

do, but assuming you get over the hurdle of the legal question that [65] has been raised by your opponent, you only make more pitfalls for yourself when you litigate your claim against the people you want to recover from in the second case, because it was in the first case that the rights of the cross-complainant and the cross-defendant were reserved for further consideration.

Mr. Garrison: Yes, but here is what happened: the indemnity agreement with Capitol provided that they would indemify us against two things, liability and loss. Our first action alleged in the first cross-complaint that if we had a liability to Defense Supplies, it should be transferred to Capitol. Since that time we have had a loss, so we have a cause of action under the agreement for that loss as distinguished from the original liability, you see, and that did not occur until we paid the judgment here in this matter.

The Court: It still would not stop you from asserting that in the first case.

Mr. Garrison: We could have amended that cross-claim and alleged it, but what is the difference? Is this Court going to spend its time to determine whether it should have been amended or set forth separately?

The Court: I am going to say something now that maybe you gentlemen will take offense to. This is a busy court. I have lots of cases to consider. Of course, all litigants are entitled to their rights here, but I think the best thing to do, with the astute suggestions and arguments of able counsel [66]

in this case, is just to set it down for final trial and hear everything everybody has to say on every subject, and I will get through with it that way. This way I will be reading your briefs on motions and then I won't be satisfied. Somebody will have a technical point that will militate against the disposition of the case on the motions, and then we will have to go back and do it all over again. I think in the long run we will be better off to do it this way.

Mr. Garrison: I have no objection.

The Court: I think I have a fairly good idea of the points that can be raised in this case. I think that we had better fix the time for trial and each side can present anything they want, both on the facts and the law, and then I shall decide the whole matter at one time.

Mr. Clark: We were trying to save Your Honor that bother. That is all.

The Court: I know, but you are living in the atmosphere of the advocate who believes he has already convinced the judge he is right and it is a waste of time to consider the other fellow's view. You may be right about it, but I would just as soon hear the whole thing at one time and get through with it. You may be quite right that the law is overwhelming, as you say it is, and in the end I will have to come to that conclusion, but I think it is better in litigation that has dragged through so many courts for so long finally to get [67] through with it. When will both sides be ready to dispose of the case finally?

Mr. Clark: So far as I am concerned, if the

Court please, according to my present calendar—of course, I cannot tell when cases go off—but I could not possibly reach it before the first of March and I would have to have a day or two to refresh my recollection if it is going to trial on the merits.

The Court: The first week in March?

Mr. Clark: Yes. I am due to go to trial on a case on the merits this month and also in February.

The Court: This would not be a protracted trial itself. It might require the submission of briefs and that sort of thing, and even if I were engaged in the master calendar work or some other work, I could hear it. Would the first week in March be all right with both sides?

Mr. Garrison: That would be all right with us.

The Court: How about the gentleman from Los Angeles? How about Wednesday, March 5th?

Mr. Archer: That is satisfactory.

The Court: I will take care of it. I will consolidate both cases. You can consider them as one and try both of them.

Mr. Archer: I just wanted to know if it wasn't by stipulation—as I stated yesterday, we objected to the consolidation because of the question of limitations and the addition of additional defendants. [68]

The Court: As far as I can see, you can still reserve all of the legal questions in a consolidated case, with respect to any particular case, because the only effect of a consolidation is for the purposes of trial. It does not affect the rights, the legal rights of the party in the particular cases that are consolidated for trial, and I think it is in

the interests of justice to consolidate them, and as I say, having as you do the right to raise any legal question in a particular case, it is just a question of hearing them at the same time. That is what a consolidation is.

Mr. Garrison: One other thought——

The Court: I will grant your motion to consolidate and I will set both cases for trial on March 5th.

Mr. Garrison: They have alleged here every statute of limitations in the Code—six months oral contract, two years, four years, judgments. One purpose of a pre-trial is to settle those issues somewhat so we know what we are going to try. I just cannot conceive that all those statutes have an effect on this case. It seems to me it would be very helpful to everyone concerned if we could get the issues down here so we would know what we are going to try. That is one of the purposes of a pre-trial conference.

The Court: What is it you want to do, ask the defendants whether they rely on all or only some of the pleaded defenses?

Mr. Garrison: Yes, I wonder if they are relying on all [69] of them.

Mr. Archer: I rely on all of them, if Mr. Garrison's statement as to what he intends to prove as to transfers are true. If he intends to go through that, I will have to rely on them. If he is relying on his assumption of guaranties, we may be limited to three and four year statutes. But the pleadings

do not allege these transfers. I can't tell what his proof is going to be.

Mr. Garrison: For instance, this is section 339, which has to do with an oral contract. Is that an issue?

Mr. Archer: Is an oral obligation in writing?

Mr. Garrison: Yes.

Mr. Archer: I do not know.

Mr. Garrison: Then did you just put them in out of an abundance of caution?

Mr. Archer: No.

Mr. Clark: If you will tell us what your theory is——

The Court: I do not think you need be concerned about that, counsel, because whatever the facts are will determine whether or not any of these provisions of law, and so far as the pleadings are concerned, even if it was not pleaded, under our present Federal Rules of Procedure it does not make any difference. Whatever the facts are, they either do or do not fall within the purview of the statute of limitations.

Mr. Clark: I am sure your Honor won't have any trouble [70] with it.

The Court: Very well. We will adjourn in this case until March 5th.

[Endorsed]: Filed May 13, 1953. [70A]

[Title of District Court and Cause No. 30473.]

DEPOSITION OF F. NORMAN PHELPS

Be it Remembered that on Thursday, the 14th day of February, 1952, at 2:00 o'clock p.m., pursuant to subpoena, at the office of Messrs. Morrison, Hohfeld, Foerster, Shuman & Clark, Crocker Building, 620 Market Street, San Francisco, California, personally appeared before me, Selma R. Conlan, a notary public in and for the City and County of San Francisco, State of California,

F. NORMAN PHELPS

a witness called on behalf of the cross-claimants.

W. R. Wallace, Jr., Esquire; Maynard Garrison, Esquire; John R. Pascoe, Esquire; Messrs. Wallace, Garrison, Norton & Ray, represented by Maynard Garrison, Esquire, and John R. Pascoe, Esquire, appeared as attorneys for the cross-claimant; and James B. Isaacs, Esquire; Messrs. Dempsey, Thayer, Deibert & Kumler; Herbert W. Clark, Esquire; Richard J. Archer, Esquire; and Messrs. Morrison, Hohfeld, Foerster, Shuman & Clark; represented by Richard J. Archer, Esquire, appeared as attorneys for the defendants.

The said witness having been by me first duly cautioned and sworn to testify the truth, the whole truth, and nothing but the truth, in the above-entitled cause, did thereupon depose and say as hereinafter set forth.

It was stipulated between counsel for the respective parties that the said deposition be reported

(Deposition of F. Norman Phelps.)

by Lucile Kirby, a duly qualified official reporter and a disinterested person, and thereafter transcribed by her into typewriting, to be read to or by the said witness, who, after making such corrections therein as may be necessary, will subscribe the same.

It was further stipulated that all objections to questions propounded to the said witness shall be reserved by each of the parties, save and except any objections as to the form of the questions propounded.

Mr. Garrison: May it be stipulated that the notary need not remain?

Mr. Archer: So stipulated.

Mr. Garrison: I take it, counsel, we can stipulate that the usual provisions relating to depositions obtain; that the deposition be signed by the witness without the necessity of the notary being present and any changes made; that the deposition be filed and used in the case the same as though the stipulation had been written out; that any objection may be reserved except as to the form of the questions until the time of trial.

Mr. Archer: I take it you mean he can sign before any notary?

Mr. Garrison: Yes.

F. NORMAN PHELPS

being first duly cautioned and sworn by the notary public to tell the truth, the whole truth, and nothing but the truth, testified as follows:

(Deposition of F. Norman Phelps.)

Direct Examination

Mr. Garrison: Q. Will you state your name?

The Witness: F. Norman Phelps.

Q. What is your business or occupation?

A. President of the Capitol Chevrolet Company in Sacramento.

Q. How long have you held that position?

A. Since 1946.

Q. Prior to that time what was your business or occupation?

A. Regional Manager of Chevrolet Motor Division in Oakland.

Q. Chevrolet Motor Division? What is that a division of? A. General Motors.

Q. How long had you been identified with General Motors?

A. Twenty-five years; twenty-six, to be exact.

Q. What month of the year 1946 did you become identified with Capitol Chevrolet?

A. I don't know. I think it was May.

Q. Had you had any connection with Capitol Chevrolet prior to that month of that year?

A. To the Capitol Chevrolet Company?

Q. Yes. A. Yes.

Q. What connection had you had with the Capitol Chevrolet Company prior to that month in 1946? A. My wife had an interest in it way back when.

Q. What is your wife's name? A. Alice.

Q. And she had had an interest, you say? Was that a stock interest? A. A stock interest.

(Deposition of F. Norman Phelps.)

Q. Had she held any position with the company herself? A. No.

Mr. Archer: For the record, I know there is no misunderstanding, but which Capitol Chevrolet Company are you talking about?

Mr. Garrison: There was only one in 1946; that was called Capitol Chevrolet Co., was it not?

The Witness: Yes.

Q. It was, then, Capitol Chevrolet Co.; we will refer to that to be certain.

A. No one had any interest in the Capitol Chevrolet Co. prior to 1946, because it was started in 1946.

Q. Your wife had had a stock interest in the Capitol Chevrolet Co. prior to 1946?

A. She had an interest in the Adams Service Company, which is the original.

Q. All right; fine. What is the Adams Service Company? A. What is it?

Q. Yes; I mean is it a corporation or a partnership? A. It was a corporation.

Q. Is it still in existence? A. Yes.

Q. Where was it incorporated?

A. In Nevada.

Q. Does it have a principal place of business?

A. No.

Q. Does it have an office of any kind?

A. Not at the present time.

Q. Do you have any interest in it yourself?

A. I think so, yes.

Q. A stock interest?

(Deposition of F. Norman Phelps.)

A. I think I own half and she owns half; in the original one why she owned it, and I didn't own it.

Q. Now, when was the Adams Service Company incorporated?

A. Gee, I don't remember.

Q. Approximately?

A. I can check that. Do you have that? I mean I don't really—don't know.

Q. Was it sometime prior to 1946?

A. Oh, yes; sure; that was a long time ago.

Q. Ten years; as long as ten years ago?

A. I don't remember.

Q. Five?

A. I don't remember; really I don't. I can get it for you.

Q. I understand. I just wanted to get some general idea. It was more than one year before 1946?

A. Oh, yes.

Q. Several years?

A. Several years before.

Q. When did you first acquire a stock interest in the Adams Service Company?

A. As to the date I can't tell you, but I bought into the Adams Service Company—I should have had my records on it. I don't know exactly the date.

Q. Was it before 1946? A. Oh, yes.

Q. Before you became identified with Capitol Chevrolet?

A. That is right; that is right; while I was with Chevrolet Motor Division.

Q. And you had at that time a one-half interest?

(Deposition of F. Norman Phelps.)

A. In the Adams Service, yes. I am not positive that is true. We can get the record.

Q. So that all of the time from the very beginning of the time you had any interest in Adams Service, it was one-half interest?

A. No. My wife put her own money in the original Adams Service Company. Then there was another one——

Q. There were two Adams Service?

A. I think there were two of them; and then I got in the other one at a later time. Anyway, that was an attorney's transaction. I don't remember too much about it.

Q. Well, let us see if we can get that. What was the name——

A. Couldn't he get the records? Can't you give that to him?

Mr. Archer: Well, give your best recollection.

The Witness: Well, give him the exact record on it.

Mr. Archer: If you can't remember, just say so.

The Witness: Well, I don't remember, but we can get the records and let you see them.

Mr. Garrison: Well, the exact date isn't too important to me. I am trying to get the approximate times, and if you want to refresh your memory we can stop a few minutes and you may do that.

Mr. Archer: We don't have them here.

The Witness: I can give them to you if it is important.

Mr. Garrison: Well, let us have your best recol-

(Deposition of F. Norman Phelps.)

lection and we will see if that is enough. Was the first company, then, called the Adams Service Company?

The Witness: Adams Service.

Q. There was more than one? A. Yes.

Q. And were there two?

A. Yes; only two.

Q. And as I understand you did not have any interest in the first Adams Service?

A. In the original one?

Q. The first one? A. That is right.

Q. Do you recall when that corporation was dissolved and a new one formed?

A. Exact dates I can't give you; we can get that for you.

Q. That was prior to 1946 sometime?

A. Naturally.

Q. You didn't have any interest in that first corporation? A. Not in the first.

Q. Whenever this second corporation was formed, it had the same name? A. Yes.

Q. They were both Nevada corporations?

A. Yes.

Q. And you then acquired a half interest in the second corporation? A. That is right.

Q. When it was formed?

A. Yes; when it was formed.

Q. So the first corporation ceased to exist and sometime prior to 1946 there was a second one of the same name of which you were half-owner?

A. That is right.

(Deposition of F. Norman Phelps.)

Q. Would you give me your best approximate date prior to 1946 that that second corporation was formed?

A. I can't give you it, but I can give it to you exactly out of the records.

Q. I understand that. Now, then, when you say the Adams Service Company had some interest in Capitol Chevrolet——

A. The first Adams Service?

Q. This second Adams Service? A. Yes.

Mr. Archer: Which Capitol Chevrolet?

Mr. Garrison: Capitol Chevrolet Co.

The Witness: You mean the old company?

Q. The Capitol Chevrolet Company we are talking about; the one that was in existence in 1946, at the time the Adams Service Company had some interest in the Capitol Chevrolet Company?

A. That is right; at the time that the original Capitol Chevrolet Company was dissolved; at that time, the one where all this fire loss and all that sort of stuff; the Adams Service Company at that time owned—at the time it dissolved—up before that it didn't have all of it, but when it was dissolved it had fifty per cent of the Capitol Chevrolet's stock.

Q. I see. And do you know when it acquired that stock? A. Over a period of time.

Q. Prior to 1946?

A. Yes; it had owned fifty per cent of it when the thing was dissolved.

Q. Yes, now, you think the month you went there was May?

(Deposition of F. Norman Phelps.)

A. I am pretty sure of it; it was April or May.

Mr. Pascoe: Off the record.

(Unreported discussion.)

Mr. Garrison: I notice, Mr. Phelps, in Mr. Kenyon's answer to certain interrogatories, he places the time when Adams Service had one-half interest in Capitol Chevrolet Company back as early as October first, 1942. Would——

The Witness: It is possible; if the records show that; I don't know. Anyhow, they did have one-half interest on May 31 of 1943 when it was dissolved.

Mr. Pascoe: '44?

The Witness: It says '43.

Mr. Archer: For the record, he is referring to the Resolutions, which is Exhibit A in the answer to interrogatories.

Mr. Garrison: Did you have any position with Adams Service Company other than stockholder at any time?

The Witness: No.

Q. You have never been an officer of that corporation? A. No.

Q. Who are the officers of Adams Service Company? A. I think my wife.

Q. Who was president?

A. I think my wife was.

Q. Do you know the name of the other officers?

A. I don't remember, I really don't.

Q. Yes; now, you think the month you want there was May?

(Deposition of F. Norman Phelps.)

Q. And you have never been an officer of that company? A. No.

Q. I take it that Capitol Chevrolet Company in the years '42 and '43 up to '46 while you were with General Motors, was a customer of General Motors?

A. That is right.

Q. Were they located in the territory that you——

A. ——that I was regional manager of, yes.

Q. You were in close contact with them during that year, during the years——

Mr. Archer: Just a moment.

Mr. Garrison: ——'42 to '46?

Mr. Archer: I object to this line of questioning. You can answer if you want to, Mr. Phelps, but if you don't want to answer you don't have to.

The Witness: Sure I was. In other words, I was regional manager; it took in eleven western states and Sacramento was one of the eleven western states.

Mr. Garrison: And you were acquainted with the management of the company at that time?

The Witness: Yes; knew them very well.

Q. Who was the president of Capitol Chevrolet Company, if you know, between '42 and '46?

A. Kenyon.

Q. James A. Kenyon? A. Yes.

Q. Did you hold the proxies of any of the stock of Adams Service Company during that time?

A. No.

Q. Did you vote?

(Deposition of F. Norman Phelps.)

A. I had not connection with it at all myself.

Q. Well, excepting as a stockholder of Adams Service Company?

A. You mean—Well, after this 19——

Q. I am talking about 1942 up to 1946, you were half-owner of Adams Service?

A. At some time, I did.

Q. And Adams Service was a half owner of Capitol Chevrolet? A. Well, yes.

Q. So you were a quarter——

A. At that time I—Do you have the records? There was one time when finally I had fifty per cent and Alice had fifty per cent.

Mr. Archer: I think that was in 1946.

The Witness: Was it?

Mr. Archer: Whatever your best recollection is.

The Witness: I can find out for you; if that is going to make any difference; I don't see what difference it is going to make. I don't know what you are trying to prove.

Mr. Garrison: I want to get now your best recollection, when you first acquired the one-half interest in the Adams Service Company.

The Witness: I don't remember.

Q. You haven't any idea?

A. But I will get it for you if you want; get you the exact date.

Q. All right. Did you attend meetings of the Adams Service Company? A. No.

Q. Did they have stockholders meetings?

A. I don't know.

(Deposition of F. Norman Phelps.)

Q. At any time?

A. The original Adams Service Company?

Q. No, I am talking about the second Adams Service Company.

A. I imagine so, yes; I mean I don't remember, exactly.

Q. Well, would you say you had attended a stockholders meeting or you hadn't?

A. Might have.

Q. Might have? A. Yes.

Q. You wouldn't know where that meeting might have been held?

A. I don't remember, but we can get the minutes for you and give them to you; if you had asked me for these things——

Q. This is the time when we ask for it, you see?

A. Well, if you had let me know.

Q. Now, I believe I asked you whether or not Adams Service Company had a place of business, didn't I, and you said "No"?

A. No.

Q. No office of any kind at the present time?

A. No.

Q. Did I ask you if you still owned any stock in the Adams Service Company?

A. No, I don't think you did.

Q. Do you?

A. I think that the Capitol Chevrolet Company might own some stock in the Adams Service Company, because it is still—it hasn't been dissolved.

Q. Is that your testimony?

(Deposition of F. Norman Phelps.)

A. I don't know; I really don't know whether it does or not.

Q. Well, don't you know what has happened to your stock you had in Adams Service Company?

A. No. The whole thing — Of course, I don't know much about the legal procedure, you are going through, but the whole thing is what we got the Adams Service Company started—my wife put her own money in it, and then we assumed the responsibility of the old company. It was the attorneys which your—that we had at that time from a tax standpoint and stuff like that made a lot—I didn't pay a lot of attention to it. I don't know what they were doing. I signed the stuff and went along with them, and that is the truth.

Q. Well, I wouldn't question that.

A. Well, anything else you want, what the hell? I will give it to you.

Q. We will ask you.

A. We are not trying to get out of anything; if you want these records, gosh, I can get them for you.

Q. That will be very helpful.

A. You can get them.

Q. So that the Adams Service corporation still exists?

A. Still in existence.

Q. Does it have any assets?

A. I think it has some assets.

Q. Do you know what they are?

A. I don't know, but they are only—I don't

(Deposition of F. Norman Phelps.)

know whether I should even talk about that or not. Is this going into the record now?

Q. Yes. A. Let's forget about it.

Q. Unfortunately, we want to——

Mr. Archer: Give us your best recollection; if there is anything that has to be corrected you can correct it. Just give your best recollection.

The Witness: I don't see any reason for all this; is what I don't understand.

Mr. Garrison: You have to let the judge decide whether it is reasonable or not.

Mr. Archer: Just answer Mr. Garrison's questions and we will be through in a short while.

The Witness: I don't care. I will stay as long as you want. Hell, I have been here now and had lunch and it is all right with me.

Mr. Garrison: Tell us about the assets of Adams Service.

The Witness: I don't know what they are; I really don't. I don't know what the assets are of the Adams Service Company.

Mr. Garrison: It looks like we will have to get some of the facts here. We can continue this deposition until some convenient date, but this gentleman obviously hasn't thought about this for some time and hasn't checked it and he is not prepared.

The Witness: It is a long time ago. I don't remember the things, but if there are certain records and certain things that they want, a history, I don't know why they can't have them.

(Deposition of F. Norman Phelps.)

Q. Well, we can, but I thought you would be able to tell us about that.

A. No, I don't remember all those things.

Q. Well, we can check back and talk about that later. Do you recall the fire that occurred out there in connection with Capitol Chevrolet warehousing?

A. Knew nothing about it; knew nothing about it.

Q. You heard about it, didn't you?

A. Oh, say three or four months later.

Q. Do you recall the occasion when Capitol Chevrolet Company was dissolved?

A. Do I recall the occasion when they dissolved?

Q. Yes. A. Yes.

Q. At that time were you an officer of Capitol Chevrolet Company?

A. You are talking now about the present Capitol Chevrolet Company?

Q. No, the first Capitol Chevrolet Company.

A. I was not.

Q. How did it happen that you knew about its being dissolved?

A. What? About the Capitol Chevrolet Company being dissolved?

Q. Yes.

A. Well, hell—Pardon me. We had an interest in it.

Q. It was because of the Adams Service one-half interest that you knew about it?

A. Definitely.

Q. So you were present at some of the meetings

(Deposition of F. Norman Phelps.)

in connection with the dissolution of the Capitol Chevrolet Company?

A. No, I don't think I was.

Q. You don't think you were?

A. Because at that time I was with Chevrolet Motors.

Q. Now, do you recall an agreement that was entered into for the assumption of liability of Capitol Chevrolet? A. For the new company?

Q. For the liability of the old company, Capitol Chevrolet Company?

A. From the Adams Service Company to the Capitol Chevrolet Company, is that what you are talking about? I understand that they assumed the responsibility of the Adams Service Company; yes, I knew that.

Q. Which corporation did?

A. The one prior to this one.

Q. The Capitol Chevrolet Company did?

A. The present Capitol Chevrolet Company didn't.

Q. But the first company did; the first Capitol Chevrolet Company?

A. I really don't—there are minutes of the corporation; we can check that for you.

Q. I am going to direct your attention to a paper entitled "Ratification and Approval of All of the Stockholders of the Capitol Chevrolet Company of the Resolution Adopted at the Special Meeting of the Board of Directors of Capitol Chevrolet Company on the 31st day of May, 1943."

(Deposition of F. Norman Phelps.)

Mr. Archer: That is the same document which is Exhibit A in the answer of the Capitol Chevrolet Company?

Mr. Garrison: Yes.

Mr. Archer: It is the same one in the answer to interrogatories.

Mr. Garrison: Do you recall the special meeting of the board of directors on the 31st day of May, 1943.

The Witness: No, I don't, but I know this thing was handled, and I know it was—that it came up and I know that they did assume the liability.

Q. Of the Capitol Chevrolet Company?

A. That is right.

Q. Who do you refer to when you say "they"?

A. The stockholders of Capitol Chevrolet Company.

Q. That would be the Adams Service Company?

A. Adams was part of it; at that time I don't remember exactly whether I had an interest in it or not, but the records will show it.

Q. Interest in what?

A. In the one that said that they would assume the responsibility of the old company.

Q. Well, Adams Service Company said they would assume the responsibility?

A. That is right.

Q. And you were a half-owner of the Adams Service Company, you testified?

A. Was I at that time, do you know?

(Deposition of F. Norman Phelps.)

Mr. Archer: I don't remember. There are two Adams Service Companies.

Mr. Garrison: One was discontinued.

Mr. Archer: If I may make a statement for the record, my understanding is that at the time of the dissolution of the first Capitol Chevrolet Company Mrs. Phelps owned the stock of the Adams Service Company.

The Witness: That is right.

Mr. Garrison: Do you know the year of that?

Mr. Archer: I say the time of dissolution, which would be May of 1943.

The Witness: That was hers.

Mr. Archer: Yes; and at that time Mr. Phelps did not own any stock in the Adams Service Company, and I would say was not an officer of the company. That is my understanding, whatever the records will show.

Mr. Garrison: Can we get those records?

Mr. Archer: Well, in regard to the records, I don't have the records.

Mr. Garrison: Where are they?

Mr. Archer: I don't think Mr. Phelps has them. Possibly they are with Mr. Dempsey or Getz and Aiken, which is a law firm, so I don't know what the records will show. What I say I say from hearsay.

Mr. Garrison: Can I get the records?

Mr. Archer: As I say, we have tried to get them ourselves and we don't have them, and I assume we can get them, but it won't be easy for me if I

(Deposition of F. Norman Phelps.)

were to get them myself. I will say if you were to tell us what your problem is we can probably make some stipulation that will be agreeable.

Mr. Garrison: Well, I have so many problems, I don't know just how to tell you what my problems are. I would like to see the records. If they aren't available, we will have to work on——

The Witness: What do you want to know?

Mr. Garrison: Well, I will forget the point. Let us get back, then, to this ratification and approval of the assumption of liability. I take it as nearly as you can tell or recall in the light of what your counsel says, that when this assumption occurred of the liability of the Capitol Chevrolet Company, you didn't have any interest in Adams Service Company?

The Witness: That is right. I think that is correct, yes.

Q. And did you acquire some interest in the Adams Service Company thereafter?

A. That is right.

Q. Do you know when?

A. No, but we can find out for you.

Mr. Archer: If we can find out.

The Witness: I don't know why we can't, if it is going to make any difference.

Mr. Archer: Don't misunderstand; we will make every effort to get the records.

The Witness: I don't see why we can't.

Mr. Archer: Well, it is just sometime ago; that is all.

(Deposition of F. Norman Phelps.)

The Witness: Well, I think the Adams Service Company—I don't think they are denying any responsibility on this thing that they agreed to it.

Mr. Garrison: Yes.

The Witness: So I don't think—Is that one of your problems?

Mr. Garrison: That is one of my problems, yes.

The Witness: Well, I don't think that will be any problem.

Q. Who signed this resolution for the Adams Service Company?

A. I imagine my wife.

Q. You don't know?

A. No, I haven't seen it, but I can find out for you, if that is your point.

Q. That is one of them.

A. Yes, we will get it for you; the only thing it has been, as I see it now—not being a lawyer, but if the responsibility—this is prior to the fire — All right; the new company assumed the responsibility.

Mr. Archer: This is after the fire?

The Witness: Yes, but this is after the fire, but it was dissolved after the fire.

Mr. Garrison: That is right.

The Witness: Prior to that they had an obligation here, which you are arguing about. Well, the new company assumed the obligation of the old company.

Mr. Garrison: That is right.

The Witness: During the fire—Therefore; therefore, I don't see the new company—Say, all right,

(Deposition of F. Norman Phelps.)

they are responsible; Now what—Are you worried about whether or not, their ability to pay if they lose the case?

Mr. Garrison: Yes; that is one of the problems.

The Witness: Well, that is the situation.

Mr. Garrison: If they have ability to pay, we can cut this very short. Does the Capitol Chevrolet Co. have assets?

The Witness: Well, no problem; if they would lose this case—Listen; does she have to keep going all the time?

Mr. Garrison: Go ahead. We are getting right down——

The Witness: Maybe I should just answer your questions yes or no.

Mr. Archer: Mr. Garrison wants you to. I have no objection. If you will ask him the questions, Mr. Garrison, we will get the answers.

Mr. Garrison: I take it, Mr. Phelps, that there isn't any question in your mind that the Capitol Chevrolet Co., the present corporation, assumed the obligation of the first company?

The Witness: I don't think they did, no. The Adams Service Company—I don't think the present Capitol Chevrolet Company, which came in 1946, did not assume the responsibility of the Adams Service Company.

Q. It didn't?

A. No, I know they didn't. We didn't assume any responsibility that was going on in that time for a lot of reasons.

(Deposition of F. Norman Phelps.)

Q. After Capitol Chevrolet Company was disincorporated, dissolved, you operated as a partnership, I believe? A. That is right.

Q. Who were the partners?

A. I don't know.

Q. You don't know who the partners were?

A. There were one, two, three, four different companies; from a tax standpoint—Cut that thing.

Mr. Garrison: Off the record.

(Unreported discussion.)

Then, in the light of what you say, then, there isn't any question but that if there is a liability here, the present Capitol Chevrolet Company will be responsible?

A. No, they won't be responsible, but the people are the same, and I don't think there is any doubt in my mind as to whether or not that if they lose the case the thing will be paid. I can assure you there has been nothing that has been done on any of these changes to do something to get rid of my liability. You can put that in the record.

Q. But you don't——

A. Do you want me to say that or not?

Mr. Archer: That is very fine, and I know that to be the fact.

Mr. Garrison: But you do not concede the present Capitol Chevrolet Company has any liability or any of the obligations?

The Witness: Or any of the liability that they have but——

Q. I understand your statement. Now, you do

(Deposition of F. Norman Phelps.)

not know who signed this assumption of liability agreement?

A. No, I don't; it is possibly my wife.

Q. And you don't know who the partners were in the partnership?

A. No; but I can get them for you.

Q. Well, the answer is no?

A. All right.

Q. Do you know when the present Capitol Chevrolet Company was formed?

A. Yes, it was formed in 1946, formed around in May—April or May of 1946, and you——

Q. That is when you went with it?

A. That is when I went with it as president.

Q. And had no connection, no position with the company prior to that time?

A. That is right. I was with Crevrolet Motor Division. I couldn't have that——

Q. I understand. On the formation of the present Capitol Chevrolet Co., what stock interest did you have in that company?

A. Fifty per cent; my wife and I had fifty per cent.

Q. Did you have that in your own names or through the Adams Service Company?

A. At the time it was put in I don't know exactly, but those records are there. We can show you that.

Q. You did have a half interest?

A. We had a fifty per cent interest.

(Deposition of F. Norman Phelps.)

Q. Has your interest changed since that time?

A. Yes.

Q. What changes have been made?

A. In 1950 Mr. Kenyon got out and Mrs. Phelps and I own it all.

Q. You acquired his stock?

A. Yes; the company acquired his stock.

Q. The company acquired the stock, and did you acquire any stock from anyone besides Mr. Kenyon, any trust or estates?

A. He had a trust at that time. I don't know whether it was dissolved before that or not. He had a trust for his daughters.

Q. And also he had a corporation that owned——

A. I imagine so; Jim Kenyon Corporation, Company or something like that. I don't know exactly.

Q. When the liabilities of the Capitol Chevrolet Company were assumed, were you present at any of the meetings?

A. No, I told you I wasn't.

Q. You were not?

A. You mean prior to 1946?

Q. Yes.

A. I wasn't in any—I mean I couldn't be.

Q. Were you familiar with the debts and liabilities of that Capitol Chevrolet Company?

A. The old one?

Q. Yes. A. Not particularly, no.

Q. You did know there was this litigation, however, as a result of this fire?

(Deposition of F. Norman Phelps.)

A. Definitely; knew that we had assumed the responsibility.

Q. You knew that? A. That is right.

Q. You knew that when you took the position as president of Capitol Chevrolet Company?

A. That is right; that is, the old company had responsibility; that is right.

Q. And that they had been assumed and that the litigation was still going on?

A. That is right.

Q. Did you have any arrangement when you came in as president, with Mr. Kenyon regarding those liabilities?

A. No; none outside the fact that this new company that we formed didn't accept any of the responsibility of any other things that went on; anything.

Q. Did you have any documents entered into in connection with that?

A. I don't remember whether we did or not; it was just—I don't know. We didn't form any responsibility for the companies.

Q. Were there any written documents with Mr. Kenyon regarding that?

A. I really don't remember that.

Q. Did you have any conversations with Mr. Kenyon about any liabilities that might be outstanding that could be claimed against the Capitol Chevrolet Company?

A. When I came in the company I said that we shouldn't assume any of the responsibility of any-

(Deposition of F. Norman Phelps.)

thing that has been going on before that, with the new company; that is the one that started in '46.

Q. Did you have that conversation with Mr. Kenyon? A. Yes.

Q. Was anything done other than just talking about it in connection with those liabilities?

A. Gee, I don't know, really; I don't know whether there was anything written up or anything like that. I presume there must have been by the attorneys. I don't know.

Q. Did you go into the question of the assumption of liability by the old stockholders of Capitol Chevrolet Company?

A. I knew that the old Capitol Chevrolet Company had assumed the responsibility of the old Adams Company. I knew that, yes.

Q. Did you know that the stockholders of the Capitol Chevrolet Company had assumed the liability of the Capitol Chevrolet Company?

A. Now, you will have to go a little bit easy with me.

Q. All right. I think you were mistaken in the last statement. Here is what happened, Mr. Phelps. When the Capitol Chevrolet Company, the first company, was dissolved, the stockholders—Adams Service Company and Mr. Kenyon—assumed that company's responsibility.

A. That is right; I knew that; the only thing —Let me say this off the record.

Q. No, it is on the record.

(Deposition of F. Norman Phelps.)

A. Well, it doesn't make any difference, I guess, unless you don't want all this conversation.

Q. Go ahead.

A. The new company did not assume any of the responsibility; the one that started in '46; that is the only one.

Q. You said that, and I am sure you hope that. I don't agree with you.

Mr. Archer: I don't think he even hopes so.

The Witness: It doesn't make any difference.

Mr. Garrison: What I want to talk about is the assumption of liability of the stockholders of Capitol Chevrolet Company.

The Witness: The present company?

Q. The present one, Capitol Chevrolet Co. Did you inquire into the assumption of those liabilities by those stockholders?

A. I think—as I understand it, and as I remember, that the——

Q. Now, the question is did you inquire into that assumption of liability?

A. I don't know whether I did or not, but I know that they assumed it.

Q. Did you know in what manner they assumed it, whether they put up cash to pay for it or securities or how they guaranteed the payment of the liability of the Capitol Chevrolet Company?

A. I see what you are getting at. Can I go back to one thing and say the old Capitol Chevrolet Company before the prior one—I am certain that they

(Deposition of F. Norman Phelps.)

will—if they have anything against them—will pay it.

Q. That isn't my question. The question is did you make any inquiry—— A. No.

Q. ——into the manner in which the liability had been assumed by the stockholders?

A. I don't remember; I don't——

Q. You don't remember whether you inquired into it or not? A. No.

Q. You knew there were liabilities existing?

A. Yes.

Q. You knew something had been done about assuming this——

A. That is right; I knew they had assumed them.

Q. Well, you don't know how?

A. By this resolution.

Q. You don't know whether they made any provisions by posting a bond or putting up cash or securities? A. No, I don't.

Q. So that you just understand that they assumed it and accepted that, as far as you know?

A. That is right.

Mr. Garrison: Well, I think we are going to need possibly the deposition of Mrs. Phelps and certainly the records of the Adams Service Company and certainly the records of the present Capitol Chevrolet Company for the purpose of determining whether or not there were any written documents in connection with this assumption of liability, so I don't know how we can do it except to find a date that is agreeable to Mr. Phelps.

(Deposition of F. Norman Phelps.)

Mr. Archer: Let me take over now, Mr. Phelps. I would think that it would be to the interest of all parties to make this subject of the present litigation as simple as possible.

To that end I want to cooperate with your problem as I see it.

You are worried about satisfying the judgment. In my own mind, first, I have no question that there won't be such a judgment and if there is I am sure you will be able to have it satisfied.

Mr. Garrison: Why don't we make some provision for that?

Mr. Archer: My word isn't good enough for that, and in the second place, I don't have authority to make provision for that, but I think provision can be made, either by furnishing you with the evidence you require or to make some other provision.

Mr. Garrison: All right.

Mr. Archer: As far as any further deposition of Mr. Phelps——

The Witness: I will give him some more if you want.

Mr. Archer: All I am thinking about is the convenience of Mr. Phelps, as far as the documents. No documents were called for in this subpoena, and they obviously should have been called for in my opinion, because of the answers in the interrogatories, but there is no sense going along that line, because in my opinion it is a side issue in the case, but I understand your interest in it, so in order to

(Deposition of F. Norman Phelps.)

satisfy that I will take it up with those who have——

Mr. Garrison: We can simplify this very materially. All we want, all this deposition is for, Mr. Phelps, is to establish the place where we are going to get paid when we get our judgment.

If you can simplify that there is nothing to it.

Mr. Archer: I am sure we can make some provision for that by making some guarantee of the payment or, two, give you the evidence you desire.

Mr. Garrison: When do you want to do that? We have a trial coming up, and we have to amend the complaint.

Let us find a date that is convenient for Mr. Phelps to come back, for the record, and then in the meantime we will try and see if we can work this other thing out. If we can, we won't have to have the deposition.

Mr. Archer: That is agreeable.

Mr. Garrison: Let us say next Wednesday.

Mr. Archer: I won't agree to the date, but I will try to get the documents for you, as I said. My only reason is the convenience of Mr. Phelps.

Mr. Garrison: Well, let us accommodate him. What do you say?

The Witness: Gosh, I don't know.

Mr. Garrison: We are talking about your convenience.

Mr. Archer: You can go ahead and ask Mr. Phelps whatever questions you want and take whatever procedure you want. I don't mean that I am

(Deposition of F. Norman Phelps.)

retracting the former statement. I think we can settle this in short order. I am telling you to do that so you won't be relying on my word for anything of this nature.

Mr. Garrison: I would like to have a date set for the completion of the deposition. If you don't want to do that we will go out and get an order of the court.

Mr. Archer: I think at the present time—I don't think you are entitled to take his deposition, willy-nilly.

Mr. Garrison: Do you want to ask any questions that I haven't touched upon?

Mr. Pascoe: Only in connection with this—Mr. Archer says he can assure us that he can furnish some sort of security——

Mr. Archer: Or the records.

Mr. Pascoe: That will avoid the necessity of our going into all this with Mr. Phelps. It would also, I take it, take away the necessity of filing an amended complaint and might simplify the entire procedure.

That still, of course, would leave us with primary issues.

Mr. Archer: Don't let my statement deter you from taking any steps in the legal matter that you should undertake.

Mr. Garrison: What I meant is, do you have any questions?

Mr. Pascoe: No.

Mr. Garrison: That is all for the moment.

(Deposition of F. Norman Phelps.)

Mr. Archer: I have one question.

Examination by Mr. Archer

Mr. Archer: Mr. Phelps, have you been testifying from any documents here during your deposition here?

The Witness: No, I haven't seen any documents.

Q. I refer you to the answer and interrogatories which have been filed in this case. Have you referred to any other documents beside those?

A. No.

Mr. Archer: That is all. You have been using your best recollection?

A. That is right; and when I told you I didn't remember, I didn't remember.

Q. If the documents showed otherwise, the documents would control?

A. Naturally they would, which I tried to explain. You understand that?

Mr. Garrison: Yes.

/s/ F. NORMAN PHELPS

United States of America,

Northern District of California,

City and County of San Francisco—ss.

I hereby certify that on the 14th day of February, 1952, at 2:00 o'clock p.m., before me, Selma R. Conlon, a notary public in and for the City and County of San Francisco, State of California, at the office of Messrs. Morrison, Hohfeld, Foerster, Shuman &

Clark, Crocker Building, 620 Market Street, San Francisco, California, personally appeared, pursuant to subpoena, F. Norman Phelps, a witness called on behalf of the cross-claimant; and W. R. Wallace, Jr., Esquire; Maynard Garrison, Esquire; John R. Pascoe, Esquire; Messrs. Wallace, Garrison, Norton & Ray; represented by Maynard Garrison, Esquire, and John R. Pascoe, Esquire, appeared as attorneys for the cross-claimant; and James B. Isaacs, Esquire; Messrs. Dempsey, Thayer, Deibert & Kumler; Herbert W. Clark, Esquire; Richard J. Archer, Esquire; and Messrs. Morrison, Hohfeld, Foerster, Shuman & Clark; represented by Richard J. Archer, Esquire, appeared as attorneys for the defendants; and the said F. Norman Phelps, being by me first duly cautioned and sworn to testify the whole truth, and being carefully examined, deposed and said as appears by his deposition hereto annexed.

And I further certify that the said deposition was then and there recorded stenographically by Lucille Kirby, a duly qualified official and disinterested shorthand reporter, and was transcribed by her.

And I further certify that at the conclusion of the taking of said deposition, and when the testimony of said witness was fully transcribed, said deposition was submitted to and read by said witness and thereupon signed by him; and that the deposition is a true record of the testimony given by said witness.

And I further certify that the said deposition has

been retained by me for the purpose of securely sealing it in an envelope and directing the same to the Clerk of the Court as required by law.

And I further certify that I am not of counsel or attorney for either or any of the parties, nor am I interested in the event of the cause; I further certify that I am not a relative or employee of or attorney or counsel for either or any of the parties, nor a relative or employee of such attorney or counsel, nor financially interested in the action.

In testimony whereof, I have hereunto set my hand and official seal at the City and County of San Francisco, State of California, this 3rd day of March, A.D., 1952.

[Seal] /s/ SELMA R. CONLAN,

Notary Public in and for the City and County of San Francisco, State of California.

[Endorsed]: Filed March 4, 1952.

[Title of District Court and Cause No. 30473.]

DEPOSITION OF ALICE PHELPS

Be it remembered that on Monday, the 25th day of February, 1952, at 10:30 o'clock a.m., pursuant to stipulation between counsel for the respective parties, at the residence of Mrs. Alice Phelps, 5117 Proctor Avenue, Oakland, California, personally appeared before me, Robert B. Manners, a Notary Public in and for the City and County of San Francisco, State of California,

ALICE PHELPS

a witness called on behalf of the cross-claimant herein.

W. R. Wallace, Jr., Esquire; Maynard Garrison, Esquire; John R. Pascoe, Esquire and Messrs. Wallace, Garrison, Norton & Ray, represented by Maynard Garrison, Esquire, appeared as attorneys for the cross-claimant; and

James B. Isaacs, Esquire; Messrs. Dempsey, Thayer, Deibert & Kumler; Herbert W. Clark, Esquire; Richard J. Archer, Esquire, and Messrs. Morrison, Hohfeld, Foerster, Shuman & Clark, represented by Richard J. Archer, Esquire, appeared as attorneys for the cross-defendants.

The said witness having been by me first duly cautioned and sworn to testify the truth, the whole truth, and nothing but the truth, in the above-entitled cause, did thereupon depose and say as hereinafter set forth.

It was stipulated that the said deposition should be recorded stenographically by Robert B. Manners, a competent official shorthand reporter and a disinterested person, and thereafter transcribed into longhand typewriting, to be read to or by the said witness, who, after making such corrections therein as may be necessary, will subscribe the same.

It was further stipulated that all objections to questions propounded to the said witness shall be reserved by each of the parties, save and except any objections as to the form of the questions propounded.

It was further stipulated that the oath be admin-

istered by Robert B. Manners, a notary public in and for the City and County of San Francisco, State of California, and that the deposition might be signed before any notary public.

Mr. Garrison: Counsel, may it be stipulated that this deposition may be signed before any notary public and that objections may be reserved until the time of trial, except for the form of the question, and that Mr. Manners may administer the oath to the witness?

Mr. Archer: So stipulated.

MRS. ALICE PHELPS

called as a witness on behalf of the cross-claimant herein, being first duly cautioned and sworn by the notary public to tell the truth, the whole truth, and nothing but the truth, testified as follows:

Direct Examination

Mr. Garrison: Q. Will you state your name, please, Mrs. Phelps?

A. Alice Phelps.

Q. Mrs. Phelps, you are the wife of Mr. F. Norman Phelps? A. Yes.

Q. You have at some time or another had some connection with two corporations known as the Adams Service Company? A. Yes.

Q. And am I correct in my statement that there were two corporations? A. I don't know.

Q. You do know that there was at least one, do you? A. Yes.

(Deposition of Mrs. Alice Phelps.)

Q. Did I state the name correctly; Adams Serv- Company? A. Well, I wouldn't know.

Q. When did you first become connected with the Adams Service Company?

A. I have no idea; I don't remember.

Q. Can you give me any approximate date?

A. No, I really couldn't.

Q. You could not. Was it sometime prior to 1946? A. Why, it must have been.

Q. And were you an officer at that——

A. I think I was.

Q. Do you know what office you held?

A. I think I was president.

Q. Was that a corporation?

A. I don't know.

Q. Do you know where it was formed or incorporated?

A. No, I really don't.

Q. Did you own any stock in the company?

A. Well, I—I did, yes; I presume I did.

Q. Do you know how much stock you owned in relation to the total stock?

A. No, I don't.

Q. Do you still have any stock in it?

A. I don't know.

Q. You do not know. Did you, as president of the corporation, perform any duties for the corporation? A. No.

Q. Did you sign any documents in connection with it?

A. Well, I—I presume I did.

(Deposition of Mrs. Alice Phelps.)

Q. You have no recollection as to whether you did sign any or did not?

A. No, I don't remember.

Q. Who advised you with respect to what you did in connection with the corporation? Did anyone give you any advice regarding it, or instructions?

A. Well, what do you mean?

Q. Well, if you were president I assume you had some functions to perform and I am wondering if you did not know about them or whether anyone advised you regarding them.

A. It was handled through the attorney.

Q. And do you know who that attorney was?

A. Mr. Getz, wasn't it?

Q. Mr. Getz of Los Angeles? A. Yes.

Q. Did Mr. Getz represent you from the beginning of the corporation?

A. Well, I don't remember.

Q. You do not remember it. When did you first learn that Mr. Getz was advising you or handling the affairs of the corporation? Could you recall that? A. No.

Q. Sometime prior to 1946? A. Yes.

Q. As far as you can recall, then, you never did anything insofar as the duties of the president of the corporation were concerned?

A. I don't remember that I did.

Q. You do not recall having performed any duties. Do you know what the assets of the corporation were?

A. No, I do not.

(Deposition of Mrs. Alice Phelps.)

Q. Do you know whether it has any assets now?

A. No, I do not.

Q. I gather then, that whatever you did in relation to that was done under the advice of your attorney and you paid no attention to the details?

A. That's correct.

Q. You signed some documents, if you did sign any, and they were handed to you and you signed them without paying any attention to what they were? A. Yes.

Q. And there might have been two—you do not know, but there might have been two Adams Service companies? A. I don't remember.

Q. All right. Are you acquainted with a corporation known as the Capitol Chevrolet Co.?

(No answer.)

Q. For your information, that is the present Capitol Chevrolet Co., as distinguished from its predecessor corporation; the Capitol Chevrolet Company—"Co." being the abbreviation of "Company."

A. Yes.

Q. You are familiar with the Capitol Chevrolet in Sacramento, of course—the one your husband is president of? A. Yes.

Q. And you have some stock in that corporation?

A. Yes.

Q. I believe you have one-half of the stock?

A. I think so.

Q. Now, do you know when that corporation was first formed? A. No.

Q. Did you know that there was a predecessor

(Deposition of Mrs. Alice Phelps.)

Capitol Chevrolet Company by that name, another corporation before this present one?

A. Yes.

Q. And did you have any stock in that corporation? A. I don't think so.

Q. You do not think you did. Do you know when you first acquired any interest in either the first or the second Capitol Chevrolet corporations?

A. No.

Q. Do you know what happened to your stock in the Adams Service Company?

A. No, I do not.

Q. Do you recall signing a document called an assumption——

(Addressing Mr. Archer): By the way, do you have that, Mr. Archer?

Mr. Archer: Yes, I have it. I will state for the record——

Mr. Garrison: Q. Mrs. Phelps, I will show you a piece of paper with some typing on it, entitled, "Ratification and approval of all of the stockholders of Capitol Chevrolet Company of the resolution adopted at the special meeting of the Board of Directors of the Capitol Chevrolet Company on the 31st day of May, 1943." I wish you would look at that and see if you can recall such a document as that and whether or not you have ever seen it and whether or not you ever signed it.

(Handing document to witness.)

A. I don't remember.

Q. You do not remember it. Now, do you recall

(Deposition of Mrs. Alice Phelps.)

the time in 1943 when the first Capitol Chevrolet Company was dissolved? A. No, I do not.

Q. Do you recall any discussions with anyone, your attorney or your husband, regarding any liabilities of that company? A. No, I do not.

Q. And is it your memory that you did not have any stock in the Capitol Chevrolet Company, the first Capitol Chevrolet Company?

A. I don't remember.

Q. You do remember, however, having stock in the Adams Service Company? A. Yes.

Q. Did the Adams Service Company own any stock in the Capitol Chevrolet Co.?

A. I do not know.

Q. I think I asked you this, but do you know what happened to your stock in the Adams Service Company? A. No, I do not know.

Q. Are you still an officer of the Adams Service Company? A. I don't know.

Q. Does the Adams Service Company have an office? A. Not that I know of.

Q. Did it ever have an office?

A. I don't remember.

Q. Well, you would have known if it had an office, would you not?

A. Well, I don't know.

Q. Were you ever in it?

A. No, I was never in it.

Q. Did you ever attend a board of directors' meeting of the Adams Service Company?

A. I don't remember that I did.

(Deposition of Mrs. Alice Phelps.)

Q. Does it have any books or records?

A. Not that I know of.

Q. Well, were you present when you were elected president? A. I don't think so.

Q. Did you ever see any books or records of the Adams Service Company?

A. No, I never saw any.

Q. And if they are still in existence, you do not know where they would be? A. I do not.

Q. Do you know of any assets that the Adams Service Company had?

A. No, I don't.

Q. Well, where did you talk with Mr. Getz regarding the affairs of the Adams Service Company?

A. I don't remember.

Q. Do you remember having met Mr. Getz?

A. Oh, yes.

Q. Do you know where?

A. In Los Angeles.

Q. In Los Angeles. In his office or at your home, or—— A. Oh, I met him many times.

Q. Oh, you have met him many times? Did you discuss the affairs of the Adams Service Company with him? A. No.

Q. Were the meetings social, or were they business?

A. Mostly social.

Q. Mostly social. And he did give you some advice regarding the Adams Service Company, did he not? A. No, no, no, he didn't.

Q. Well, did anyone? A. No.

(Deposition of Mrs. Alice Phelps.)

Q. Did your husband talk to you about it, or——

A. Yes.

Q. (Continuing): ——discuss it with you?

A. Yes.

Q. Well, when you became president and were president, if you signed any papers in connection with being president, who would have told you to sign them? A. My husband.

Q. In other words, this was an activity on your part as the wife of Mr. Phelps and you did whatever you did according to his direction?

A. Yes.

Q. And so far as you presently know, you have no recollection about the details of any of those things at all?

A. No, I don't.

Q. Have you told me as much as you can recall about your relationship to the Adams Service Company or the Capitol Chevrolet Company?

A. Yes, I have.

Q. And they are just names in your mind and there is nothing else you can remember about it?

A. Yes.

Q. You did not talk to any attorney about it?

A. No.

Q. And whatever you did in relation to it, you did under the direction of your husband?

A. That is correct.

Q. I may have asked you this, but are you an officer of the Capitol Chevrolet Co. at the present time? A. I don't know.

(Deposition of Mrs. Alice Phelps.)

Q. Have you ever been?

A. I don't remember.

Mr. Garrison: I think that is everything, thank you very much.

Mr. Archer: I have no questions.

/s/ MRS. ALICE PHELPS

State of California,
Northern District of California,
City and County of San Francisco—ss.

I hereby certify that on Monday, the 25th day of February, 1952, at 10:30 o'clock a.m., before me, Robert B. Manners, a notary public in and for the City and County of San Francisco, State of California, at the residence of Mrs. Alice Phelps, 5117 Proctor Avenue, Oakland, California, personally appeared pursuant to stipulation between counsel for the respective parties, Alice Phelps, a witness called on behalf of the cross-claimant herein; and W. R. Wallace, Jr., Esquire; Maynard Garrison, Esquire; John R. Pascoe, Esquire, and Messrs. Wallace, Garrison, Norton & Ray, represented by Maynard Garrison, Esquire, appeared as attorneys for the cross-claimant; and James B. Isaacs, Esquire; Messrs. Dempsey, Thayer, Diebert & Kumler, Herbert W. Clark, Esquire; Richard J. Archer, Esquire, and Messrs. Morrison, Hohfeld, Foerster, Shuman & Clark, represented by Richard J. Archer, Esquire, appeared as attorneys for the cross-defendants; and the said Alice Phelps being by me

first duly cautioned and sworn to testify the truth, the whole truth, and nothing but the truth, and being carefully examined, deposed and said as appears by her deposition hereto annexed.

And I further certify that the said deposition was then and there recorded by me, a duly certified official reporter and disinterested person, and was transcribed by me; and I further certify that at the conclusion of the taking of said deposition.

And I further certify that I am not of counsel or attorney for either or any of the parties, nor am I interested in the event of the cause; I further certify that I am not a relative or employee of or attorney or counsel for either or any of the parties, nor a relative or employee of such attorney or counsel nor financially interested in the action.

In testimony whereof, I have hereunto set my hand and official seal at the City and County of San Francisco, State of California, this 3rd day of March, A.D. 1952.

[Seal] /s/ ROBERT B. MANNERS

Notary Public in and for the City and County of San Francisco, State of California.

State of California,
County of Alameda—ss.

I, R. C. Anderson, a Notary Public in and for the County of Alameda, State of Californa, duly commissioned and qualified to administer oaths, do hereby certify that the witness in the foregoing deposition named Alice Phelps, appeared before

me on the 4th day of March, 1952, and that said deposition was submitted to the said witness for reading, correcting, and signing, and being by her read and corrected by her in all particulars she desired (such corrections being initialed by me) was by her subscribed in my presence and sworn to before me as such notary public.

And I further certify that I am not of counsel or attorney for either or any of the parties to said deposition, nor in any way interested in the outcome of the cause named in said caption.

In witness whereof, I have hereunto set my hand and affixed my seal of office, this 4th day of March, 1952.

[Seal] /s/ R. C. ANDERSON

Notary Public in and for the County of Alameda, State of California.

[Endorsed]: Filed March 5, 1952.

[Title of District Court and Causes 23171-30473.]

REPORTER'S TRANSCRIPT

Wednesday, March 6th, 1952

Before: Hon. Louis E. Goodman, Judge.

Appearances: For Cross-Claimant: Lawrence Warehouse Company: Messrs. Wallace, Garrison, Norton & Ray, by Maynard Garrison, Esq., and John R. Pascoe, Esq. For Cross-Defendants: James B. Isaacs, Esq., and Messrs. Dempsey, Thayer, Dei-

bert & Kumler; Herbert W. Clark, Esq., Richard J. Archer, Esq., Messrs. Morrison, Hohfeld, Foerster, Shuman & Clark. [1*]

The Clerk: R.F.C. vs. Capitol Chevrolet Company and Defense Supplies Corporation vs. Lawrence Warehouse Company, consolidated for trial.

Mr. Garrison: Ready for the cross-claimant.

The Clerk: Will respective counsel please state their appearances for the record?

Mr. Garrison: For the cross-claimant Lawrence Warehouse Company, the firm of Wallace, Garrison, Norton & Ray, by Maynard Garrison and John Pascoe.

Mr. Archer: For the cross-defendants James B. Isaacs and Dempsey, Thayer, Deibert & Kumler; Herbert W. Clark, Richard J. Archer, and Morrison, Hohfeld, Shuman and Clark.

The Court: Proceed.

The Clerk: Counsel, do you wish to file these depositions as we go along?

Mr. Garrison: Yes; I will mention them as I go along.

I think, your Honor, the best way to take up where this case left off in 1944 would be for me to make a short opening statement to bring us up to date on the developments since that time to be sure that we have the situation pretty well before us, and then argue the legal problems as your Honor might think necessary.

I might say in this connection that, as the cross-claimants [2] in both the original case No. 23171,

and the second case consolidated, we do not intend to introduce any evidence by way of testimony. We will present for the file and for filing the interrogatories that have been taken and the depositions that have been taken, and it is our position that, with the evidence in the original case, that will be sufficient for the purpose that we seek here.

I know your Honor has heard a good deal about this case—more than probably it was your wont—and I shall not burden the time of the court with a repetition of many of the factual situations which I am sure are clear in your Honor's mind. I do think, however, that there are three or four essential pieces of evidence in the record which I think ought to be mentioned at this time, and I will do so as briefly as I can.

Mr. Archer: May I interrupt just a moment? It may be a little bit difficult from what you say to tell when you finish your statement and when you are introducing evidence. If you will just distinguish——

Mr. Garrison: We will try to make that clear.

As I said, we are here today with two consolidated cases: the first, 23171, which is the original action, and then 30473, which is the case that originated as a result of the Supreme Court's suggestion that Defense Supplies or Reconstruction Finance Corporation should sue on the [3] judgment that they obtained in this Court. I don't know why the Court suggested that, because they had a judgment and could have executed on it. But the Supreme Court did say that they should proceed to sue on

the judgment, and the Defense Supplies Corporation did sue on that judgment as a separate proceeding from the original litigation. And when they served us, we, in due course, cross-claimed in that case as we had in the original case, and that is the way in which we happen to have two cases here to some extent overlapping.

I think that it would be expeditious at this point to confine the first part of what I have to say to 23171, the first case and our first cross-claim, because in that cross-claim we are concerned only with one principal defendant, corporate defendant; in the second case we are concerned with a number; and it seems to me it would be easiest for us to get it into our minds again if we first took up 23171 and then the second case.

Your Honor will recall that at the conclusion of that first case by the Government, it was felt by counsel, as expressed to your Honor, that if the defendants were successful in that litigation and the case decided against the Government, there wouldn't be anything to litigate between the defendants, because there wouldn't be any indemnity problem arise; and for that reason we agreed with your Honor [4] that the matter of the cross-claim be held in abeyance until the principal litigation was decided finally and that thereafter the defendants could litigate their problems between themselves. So now that that first litigation, the prinicipal complaint, has been decided and the judgment rendered and paid, we now come back just as though we were

proceeding back in 1944 to consider the cross-claims between the defendants.

I might say in connection with that litigation, there is a daily transcript in the file, so that if your Honor does not have all of the evidence which was introduced in your mind, it is available for you in that form; all of those exhibits are of course preserved; and there is likewise a Clerk's transcript which is printed and a little easier to handle that was used on the appeal; but insofar as 23171 is concerned, all of that evidence introduced in the main case is before you and available.

A few points of importance which I think we should have clearly in our mind are:

First, the master contract between Defense Supplies and Lawrence Warehouse providing for the warehousing of these tires in a large area. That document is part of the evidence.

Secondly, the contract between Lawrence and Capitol Chevrolet Company, its agent, for the storage on behalf of Lawrence Warehouse of the tires in a restricted or limited [5] area, in this case Sacramento. And that contract is likewise in evidence, and the section of it, paragraph II which is in point, reads as follows: "To furnish suitable"——

Mr. Archer: Your Honor, I wonder if we are going into the evidence now or still in the opening statement. It of course is our position that the evidence which counsel is referring to is not in the case. That has been our contention, as you know on the pre-trial conference, that it has been merged in a final judgment. So I don't know whether we are

going into the evidence now or whether this is an offer of evidence, or whether it is still the opening statement. If it is the opening statement, I object to it for the reason——

The Court: Your point is that the court cannot consider in this case the evidence that was before the court in the trial?

Mr. Archer: Yes, that is right, your Honor.

The Court: Why?

Mr. Archer: Because it has been merged. Just as the preliminary negotiations leading up to a contract can no longer be proved when you reach a final contract, I have the authorities which say that the proceedings of a trial when merged into a final judgment cannot be proved unless the judgment is ambiguous. And I am prepared to prove that there is no ambiguity in this judgment.

The Court: As I remember, the parties had agreed that [6] this particular matter should await the determination of whether or not there was liability at all to the plaintiff.

Mr. Archer: Well, you may be correct, your Honor, but I think that they said that there would be another trial. If I may refresh your Honor's recollection, the matter came on for trial before you rendered judgment but after you had written your opinion, the matter did come on for trial and it was set off calendar. I have seen no order that the evidence in the one would be the evidence in the other. In other words, as between Lawrence Warehouse and Capitol Chevrolet Company no evidence has been introduced.

The Court: At any rate, the evidence as to what occurred is in there. Is it your idea that all of those witnesses would have to be called over again to testify?

Mr. Archer: No; it is my position, your Honor, that you have a judgment, findings of fact and conclusions of law, and that is it. I would object if they offered to call witnesses, because, as I say, it has been merged, and I am prepared to support that with authorities.

The Court: I remember your argument on that. That judgment was against Capitol Chevrolet Company, and the Lawrence Warehouse Company, and McGrew, cross-defendants.

Mr. Archer: That is right, your Honor.

The Court: And your argument was, as I remembered at that time, that since that was a judgment against all of the [7] parties, that it held all parties liable——

Mr. Archer: That is right.

The Court: ——and that, therefore, your point was that that foreclosed the right of one to proceed against the other.

Mr. Archer: That is right.

The Court: Of course, generally I think that may be true, except for the fact that the parties agreed that there was to be separate litigation between the parties one against the other on a cross-complaint which was then on file.

Mr. Archer: Well, I don't know; as far as I have been able to determine, there is nothing to that

effect in either the minute book or the records of the case or in the transcript.

The Court: I don't know where I could have gotten the idea from if it did not transpire in Court.

Mr. Archer: Pardon?

The Court: I say, I don't know where I could possibly have gotten that idea if it wasn't so stated at the time.

Mr. Archer: Well, I have read the transcript, your Honor, and if there is something to that effect it should be in the transcript, or as I referred to, the minute order, but I don't think there has been any agreement as to what is evidence and what is not evidence. The general rule is that evidence in one trial is admissible only on the same [8] points on which there has been a right to cross-examine.

Mr. Garrison: I think, your Honor, we will get to those legal points, if he raises them in the proper order, and I would like to go along. I think when they come up we will be prepared to present the authorities to meet his authorities.

The Court: I think the point that your opponent is making is a legal question.

Mr. Archer: I wanted to know so I could make an objection if this were evidence.

Mr. Garrison: We are in this position: We have a case, 23171, that case right there, which had a complaint filed, an answer filed, and cross-claims filed. Your Honor passed and decided on the principal complaint, and the cross-claims have never been decided, and they were specifically reserved, as I understood it, for trial at a later date. So we

have a cross-claim in that case which has never been decided and the issues have never been litigated. What we are doing now is proceeding to complete that trial and try the cross-complaint.

Mr. Clark: If your Honor please, might I interrupt? Mr. Archer has presented a point, but I want to be sure, if the Court please, that this record is clear. May I ask, through the Court, a question of counsel to clarify the position we are in now. We don't know whether to object or not. If counsel is making an opening statement, that is one [9] thing. If he is also independently introducing evidence, that is an entirely different thing. If he is making both an opening statement and introducing evidence, that is a third thing. And I think the defendants are entitled to know precisely what it is that counsel is intending to do here so that we will be in a position to make our record. If it is an opening statement, we will remain quiet while it is being made. If he is introducing evidentiary matter, that is an entirely different matter.

Mr. Garrison: I of course can——

Mr. Clark: Counsel can tell us what he is doing, but he hasn't done it.

Mr. Garrison: I didn't think it was necessary.

Mr. Clark: We won't waste the time of the Court at all if counsel would just say precisely what he is doing here.

Mr. Garrison: I will be glad to say exactly. I thought I did.

The Court: Suppose you have that in mind.

Mr. Garrison: Yes.

The Court: I have a request for some advice from the Grand Jury. I will have to take a very brief recess.

(Recess.)

Mr. Garrison: I believe your Honor has a copy of the Clerk's transcript before you. [10]

The Court: Yes.

Mr. Garrison: If you will look at page 75—that happens to be a portion of your Honor's opinion rendered at that time, and if you will read the top of page 75——

The Court: Yes.

Mr. Garrison: On the basis of that opinion, it is our position that we are in exactly the same situation today as if we had proceeded the next day after the plaintiff finished its case on the cross-claim issues. And of course under those circumstances, every bit of the evidence and the exhibits introduced in that litigation would be before your Honor, because it is the same case. This only is a cross-claim in that same litigation. And it is inconceivable to me that counsel can suggest that the evidence in a piece of litigation where there is a complaint and a cross-claim is not in the record for all purposes including the issues on the cross-claim.

The Court: Well, why don't you just offer that and let counsel make his point?

Mr. Archer: Is this an offer or the opening statement?

Mr. Garrison: I didn't think that it needed to be offered, because it is in 23171, being the case that we are on trial on, on the trial of the cross-claim.

The Court: Then move the court that the record be offered as part of the record in the instant issue, in [11] connection with the instant issue and give counsel an opportunity to make his objection for the record.

Mr. Garrison: I move that the record of evidence, the transcript in 23171, be before your Honor at this time in connection with the cross-claim that is a part of that proceeding, and that it be considered by your Honor in connection with the issues which have not been litigated in that case on the cross-claim.

Mr. Archer: You are offering it only as to 23171?

Mr. Garrison: Yes.

Mr. Archer: I object on the ground that it is incompentent, irrelevant and immaterial, and on the additional ground that it has been merged in a final judgment and conclusions of law on findings of fact, and on the additional ground that it is res inter alios.

The Court: On the ground that the court specifically reserved jurisdiction to determine the issues in the cross-action, I will overrule the objection.

Mr. Archer: May I state, your Honor, we have no argument with having this case come on for trial, but we do have argument as to what will be the evidence at that trial. I admit you reserved jurisdiction to try this case, but I don't think you reserved any right to consider any evidence.

Mr. Clark: You couldn't have done that.

The Court: What you are saying amounts to

this: That [12] if it were necessary to determine the rights and liabilities of the parties on these cross-actions, that the court would have to hear all this evidence over again and have it re-introduced, and all of the documents that were introduced at the other hearing.

Mr. Archer: Well, that may be one aspect of what I am saying, but I think that the law is clear between an indemnitee and an indemnitor——

The Court: You may be entirely right as a matter of law, but I see no reason as a matter of procedure, that the court has to go through the vain act of resubmitting the testimony of these witnesses and of re-introducing the documents in evidence. The legal effect may be quite as you say, but as a matter of procedure, I don't think that there is any need to be wasteful of time and duplicative of the evidentiary matters.

Mr. Archer: Your Honor, I am contending precisely this: When this case came on, it was the case of the Defense Supplies Corporation, and they had the right to sue whomever they chose and present their evidence without any question as between the defendants. Now as a matter of fact, that did not happen, but they could have. What your Honor is saying is that Capitol Chevrolet Company could have objected to evidence offered by the Defense Supplies Corporation on the ground that as between Lawrence and Defense Supplies [13] Corporation it was not admissible. That is not true. The issue then, as far as Capitol Chevrolet Company was concerned, the only objections it could make and the

only cross-examination it could conduct, was on the issue of whether it alone was liable to Lawrence Warehouse Company. It couldn't cross-examine on any of these other issues.

The Court: Of course that would entail only a question of law, wouldn't it?

Mr. Archer: Why, it is a question, if we didn't have the right to cross-examine, then it is hearsay, your Honor, and that is a question of evidence and res inter alios.

Mr. Garrison: I don't think counsel has read the new rules of procedure.

Mr. Clark: I think we have authorities to support this position, if the Court please, and it is a highly important situation in the case.

Mr. Archer: What your Honor is saying is that when this case came on for trial, Mr. Getz representing the Capitol Chevrolet Company could have objected to evidence on the ground that as between him and Lawrence Warehouse it was not admissible. Well, he certainly couldn't embarrass Defense Supplies in the case.

The Court: It is my recollection that some place in the transcript in this case there was a statement by counsel which prompted me to make the ruling as to retention of [14] jurisdiction and that the parties would go on with the case——

Mr. Garrison: At a later date.

The Court: ——after determination of liability to determine claims one against the other.

Mr. Archer: Your Honor, I am not saying that that is not true. I am saying Lawrence Warehouse

has a right to bring this action against us. They certainly have the jurisdiction; they don't have to file a new complaint and get out a new summons, but there has been no agreement as to what the evidence is.

The Court: Is it your contention that all circumstances in connection with the fire and so forth would have to be represented to the court on these cross-complaints? I understand that from what you are saying, because you have just said that there was no opportunity to cross-examine by the Capitol Chevrolet Company on evidentiary matters that would have a bearing upon any liability of Capitol Chevrolet Company to Lawrence Warehouse Company. So I take it that if what you are saying is true, that then all of that evidence has to be taken over again to permit that right of cross-examination by the Chevrolet Company with respect to any claim of liability on its part to the Lawrence Warehouse Company.

Mr. Archer: On the basis on which the offer was made, your Honor, in this case at this time I would say you are right. I don't think that that is necessarily so, because as [15] I said before, you have a judgment, and findings of fact and conclusions of law on the relationship between the parties, but the offer was not made in that respect.

The Court: You mean——

Mr. Archer: ——with the offer made it was.

The Court: You mean the findings can be taken into account but not the evidence?

Mr. Archer: The judgment, your Honor. I would

say the judgment is the real integrated document. In some cases I am prepared to show you can go to the findings and conclusions.

The Court: That I understand is a question of law. It may be still good, but if I were to rule out now any record to be made in the case, then you might find yourself worse off if you won the case on the question of law, than you would if the Court had permitted a complete record and then determined as a matter of law in your favor.

Mr. Archer: I understand. I think we will win either way.

The Court: That is pardonable enthusiasm, but nevertheless——

Mr. Garrison: It is shared by both sides.

The Court: Nevertheless, I don't think that it would be proper for the Court to rule as a matter of law that the only thing that counsel can present is the judgment. That is what you are saying. [16]

Mr. Archer: That is right, your Honor.

The Court: I am going to allow the whole record in. Your objection is noted, your point is made. Anybody looking over it would not have any misunderstanding as to the nature of the point raised. You still have the perfect right to argue that despite the fact that the record is in, that the Court is nevertheless confined to the judgment, so that there is no harm done to anyone in that connection.

Mr. Archer: Your Honor, of course we opposed the consolidation in this case. I notice there was a formal order prepared, and I would like to note for the record we opposed it.

Mr. Garrison: I am not saying that you did not.

Mr. Archer: Just for the record.

Mr. Garrison: It is in the record.

Mr. Archer: This evidence has only been offered in 23171. The final remark I would have to make is that I know of no law written any place that would allow evidence in as against a defendant for the purposes for which it has been offered.

The Court: After they get the whole record in, then you may make motions and reserve the right to do that; and if it appears as a matter of law at that time that the only basis upon which the Court can determine this case is on the basis of the judgment of the case and that is the law, I will so [17] hold. But I am not going to make the ruling in advance.

Mr. Archer: Very well.

The Court: I think that fully protects your rights.

Mr. Archer: Now I wonder, to get back to the other question, if we are starting with the evidence. I think before the evidence is presented, if that is what you are doing, I have some documents—for instance, the Phelps' answers are not due until tomorrow. Two additional defendants were served in the other case, 30473. Their time——

The Court: Let's wait until we get to that case; counsel, I understand, are offering it only in the one case.

Mr. Garrison: 23171.

Mr. Archer: Aren't we offering evidence in 30473?

Mr. Garrison: No, I am only offering——

The Court: Let counsel get through, and when he is through——

Mr. Archer: Is this just an opening statement?

Mr. Garrison: I don't think I have to be interrogated by counsel.

Mr. Clark: I wish to have it understood that we are going to make the record here whether counsel likes to be interrogated or not.

The Court: Let's not get into a quarrel about it, gentlemen. You are making it extremely difficult for me to follow with any clarity the presentation of the matter. [18] There are competent counsel on both sides, and each side will be given their opportunity. I am not going to brush anything aside one way or another. The only point the court has made thus far, I want the record made first, then you may argue the matter on both sides and make any motions you want to your heart's content. Let's each one give the other a chance to do that. Therefore, so the record will be straight, you have made a motion, which I have granted, to let the record in that case be considered as part of the record in this case. In admitting that I have done so over the objections stated by counsel on the other side, without prejudice to their right to move to strike that record if it appears when the case is concluded that it is not properly before the court.

Mr. Garrison: Thank you, your Honor. I think they would have the right to make that motion at any time. And I might say, for their information, that I view what I am saying now as an opening

statement. I take the position that the evidence already in this case, 23171, is in it whether I moved it or the court orders it or anything else, it is in the case, and it is in for all purposes. And I am certain the law is very clear on that.

If I may resume. I have said that the important factual items which are in this evidence already are, first, the main contract, and, secondly, the contract between Lawrence [19] and its agent Capitol, and that contract in paragraph 2 provides that the agent is "to furnish suitable storage space for the storage of such tires and tubes as may be delivered to agent to the total available capacity of agent."

The Court: Read that again. I missed it.

Mr. Garrison: It says, "to furnish suitable storage space"—Capitol is—"for the storage of such tires and tubes as may be delivered to agent"—Capitol—"to the total available capacity of agent."

Paragraph 3: "To store and safeguard the storage of such tires and tubes as are received by agent."

Paragraph 8: "To indemnify the principal against loss or damage resulting from a failure on the part of the agent to perform any of the duties or obligations above set forth."

In connection with that contract it ought to be noted that the only express right given to Lawrence under the contract is to inspect Capitol's records. Beyond that it has no right to direct its actions in connection with the storage of tires.

Another bit of evidence that I think is important is the written instructions that were furnished by

the Defense Supplies to both Lawrence and its agent Capitol that they were not to allow anyone in those premises for any reason [20] whatsoever. I take it that involved security, national defense, as well as fire, and so forth.

A list of persons who were approved was furnished to Capitol by Defense Supplies. That list is in the record, enumerating certain individuals, government officials and so forth. Not even Lawrence was listed as approved to enter the premises of Capitol Chevrolet.

Then of course the evidenec is in the record that the owner of the building sent a note, and Mr. Kenyon of Capitol Chevrolet made the arrangements, for the man to go in the building,—a man who was not permitted in under the list of approved persons; arranged for him to go in there with the acetylene torch and the fire started. And the contention at the time of trial, and our contention now, is that the negligence in this case is the negligence of Capitol in permitting an unauthorized person to go in first, and, secondly, not taking any precautions whatever to see what he was doing there or that he had facilities to prevent fire, and so forth, and the further fact that Lawrence had not even knowledge of that action until it was over and the fire had occurred.

I believe the thing that Mr. Archer is talking about in this preliminary discussion is the same thing that he has alleged in his answer, and that is that your Honor has found in the findings in the first case that the negligence of [21] Lawrence and

Capitol joined and concurred to create the loss. And I believe the principal defense in this case that they have suggested thus far is that regardless of the fact of whether or not Lawrence was negligent, that by reason of your Honor's having signed those findings, that you and all of us are hereafter forever precluded from rendering any judgment in the case on the merits and that finding is binding on you in this proceeding on the cross-claim.

The Court: That is finding No. 6 in the findings?

Mr. Garrison: Yes.

The Court: "That the negligence of the defendants McGrew, Lawrence Warehouse and Capitol Chevrolet concurred and joined together to destroy plaintiff's goods."

Mr. Garrison: Yes. Now he says this morning, as I understand it, that by reason of that finding and judgment, that all of this has been merged in there and that if we were negligent, or, rather, regardless of whether we were negligent, that finding precludes you now from a judgment in favor of us against our agent indemnitor.

The Court: Well, he has urged that point.

Mr. Garrison: He has urged it right along. That is the legal point in the case which we are prepared to meet, and I propose to go into it right now.

The Court: As I remember the argument that was made [22] heretofore in the matter, it was claimed that if there was joint negligence, there would be no right——

Mr. Garrison: Joint tort feasors, no right to——

The Court: No right of recoupment. Your con-

tention was that you are claiming on the basis of some indemnity agreement.

Mr. Garrison: Yes, we have a number of reasons.

The Court: It seems to me that the whole matter is only a question of law. However, I think you should make your record clearly.

Mr. Garrison: Yes. I think that matter is a question, as I argued at the time of the pre-trial conference, that we should decide on the motion for summary judgment; but they said there were questions of fact, so we are here today to hear their questions of fact. And I may say in that connection——

The Court: Really the only question in the case —maybe I am over-simplifying it, I don't know —is whether or not——

Mr. Garrison: Whether we are barred by that finding.

The Court: ——whether with the finding here involved, you have any right to recover against the Chevrolet Company on an indemnity agreement.

Mr. Garrison: That is exactly the point. We are prepared to meet that. We were prepared to meet it at the [23] pre-trial on the question of law, but they said they had questions of fact. Your Honor said, "If you have questions of fact, we will set it down for trial," and that is why we are here.

On that very point, I have an answer to what Mr. Archer stated about his cross-examination in that former trial. I answer that by the fact that we are now proceeding with that trial, they are per-

fectly entitled to bring in any further evidence that they wish to bring in and produce witnesses for further cross-examination here. There is no restriction on what you can go into in this record, either in impeachment of the witnesses or in connection with any part thereof.

The Court: You are merely asking that the record be considered as part of the case?

Mr. Garrison: It is in here. I don't think your Honor can strike it out if you wanted to, because we are in 23171, and we have the right——

The Court: What is it that you are going to put in as part of your case, inasmuch as the record which is already in includes the documents and the findings and the judgments and the exhibits? Is there anything else that you are going to put in as part of your case in No. 23171?

Mr. Garrison: No, that is our case.

Then I shall move over to the second consolidated matter and introduce the interrogatories and the depositions in [24] evidence.

Mr. Pascoe will tell me there is something else. We do have one matter, and that is the uestion of our attorney's fees in connection with defending the litigation which we contend we are entitled to recover from our indemnitor as part of the indemnity agreement. You have a copy of our answer to your interrogatories which I believe we have filed. I have a witness on call who will establish the facts, but your Honor said at the pre-trial that we should get together and try to thrash this out between ourselves.

Mr. Archer: Mr. Garrison said he would have it for me Monday; I just got it about ten o'clock.

Mr. Garrison: There is an item of $8,000 for attorney's fees.

The Court: What you are trying to say is whether or not you can get a recovery, if you are entitled——

Mr. Garrison: If we are entitled to anything, that would be the amount of the attorney's fees.

Mr. Archer: I won't stipulate to that. We are objecting to the answer in Interrogatory No. 3. I will stipulate that the amounts set forth there were paid.

Mr. Clark: I would like to read that in the record, if the Court please.

Mr. Garrison: The interrogatories will be filed anyway.

Mr. Archer: That isn't evidence. [25]

The Court: The stipulation is all you need.

Mr. Garrison: If you don't stipulate, we will call the witness.

Mr. Archer: The reason I wanted to put it this way is I have certain objections to make to various sums that are set forth here, and I think it would be to any sum after January 2, 1948 on the ground that it was an unreasonable expenditure. Your Honor will remember that notice of appeal was filed in the case and no substitution was made on the part of Defense Supplies Corporation, so in effect there was an abortive appeal, and it is going to be our position that from that point on every-

thing connected with the appeal would be an unreasonable fee.

Mr. Garrison: Mr. Archer, you will not agree that anything is due us or if anything is due us, the items are chargeable to your client at all. All we are talking about is that if a witness were called he would testify that Lawrence Warehouse paid those sums in connection with our work in this case.

The Court: Irrespective of the materiality, reserving his point; is that what you mean?

Mr. Garrison: Certainly.

Mr. Archer: Your Honor, there is one other thing. It doesn't appear what part was paid for the appeal and what part was paid for the trial. I will tell you what I will do. I will hand my copy of the interrogatories to the reporter and ask that he copy them. I will stipulate to the truth of the facts therein under "Attorney's Fees" and down to line 23 on page 26, $1419.25, subject to the objection I have made.

The Court: Does that cover it?

Mr. Garrison: Are you stipulating to part and not another part?

Mr. Archer: No, that is all the figures you have here.

Mr. Garrison: The total amount is eight thousand and something, isn't it?

Mr. Archer: There was a segregation.

(Private conversation between counsel.)

Mr. Garrison: I see. Fine. That is fine.

The Court: That covers the stipulation, counsel, satisfactorily?

Mr. Garrison: That is right; that would be the evidence if the witness were called. The legal effect of it is quite something else again.

The Court: Very well.

Mr. Garrison: As I said, that is all the evidence that we intend to introduce insofar as 23171 is concerned, and I will be very glad to proceed now to tell you why I think we are entitled to do this in 23171.

The Court: Let's save that. Let's get in the record what evidence you wish to present in the other case. [27]

Mr. Garrison: In the other case——

Mr. Archer: I would like to make an objection in 23171, an objection to the admission of any evidence in 23171 or 30473, your Honor, on the ground that on the basis of the judicial knowledge of the Court and on the basis of the pleadings, it affirmatively appears that Lawrence Warehouse Company is not entitled to any relief in either case against any cross-defendant. I wanted to make that point.

Mr. Garrison: I will stipulate that you did make the point or it may be considered made in 23171.

The Court: At this time I will reserve ruling on it.

Mr. Clark: Your Honor has no objection to the form of the objection?

The Court: No.

Mr. Clark: Your attention was not called to the specific items of judicial knowledge.

The Court: No. You put it in any form that you want. I will reserve the ruling.

Mr. Archer: At this time I have written motions; I don't propose to argue them or take any more of the Court's time, in both cases. I would like to file them and serve them here in Court. And for that reason I have a memorandum of points and authorities attached to the motion in 30473.

Mr. Garrison: Why don't you wait until I finish?

Mr. Archer: I wanted to make that—— [28]

The Court: All right; counsel will file his motions and give a copy of them to your opponent. I will reserve ruling on it.

Mr. Archer: I will serve copies on counsel.

Also in 30473 that motion is on behalf of the defendants F. Norman Phelps and Alice Phelps who have not as yet answered in the case. In other words, this is their first answer. But if it is acceptable to counsel, I will also file their answers.

Mr. Garrison: You said you would file them. I assumed you would.

The Court: The record will show that counsel has filed the answer.

Mr. Archer: Well, no, I have filed the answer of the Phelps' in 30473.

The Court: All right.

Mr. Archer: There is an answer to the amendment to the cross-claim and to the cross-claim.

The Court: Also you are filing the motion to dismiss.

Mr. Archer: To dismiss.

The Court: The answers may be filed, and the Court will reserve ruling on the motions. I think you had better mark these filed.

Mr. Archer: I guess the record would show that they have also been served on counsel. [29]

Mr. Garrison: Do you have the original answer to interrogatories of J. A. Kenyon?

The Court: They are on file. They have just been filed.

Mr. Garrison: The original, no, sir.

Mr. Archer: As far as we know, that was the one which was lost in the mail.

Mr. Garrison: Do you have a copy?

Mr. Archer: I have a copy of the answer.

Mr. Garrison: If you will provide me with a copy, I will stipulate that the copy may be filed and considered the same as though an original had been filed.

Mr. Archer: I will see if I have that.

Mr. Garrison: I will get one. That apparently got lost in the mail. It is the answer to our interrogatories.

Mr. Archer: An answer was served. The answer does not have to be filed. Generally we do, but this was lost in the mail. We did serve the answer.

Mr. Garrison: Yes, a copy, but we do not have the original. I am calling on you for the original to file in the Court.

Mr. Archer: There is no rule that requires it.

Mr. Garrison: No, there isn't, but I asked for it.

Mr. Archer: We can get a copy. I do not have an extra copy. [30]

Mr. Clark: You can make an extra copy and get it to him.

Mr. Archer: These were lost in the mail, your Honor.

Mr. Clark: Perhaps there is one here.

Mr. Garrison: I take it the original depositions of——

The Court: Let's get through with one matter at a time.

Mr. Garrison: They are getting that. I can just finish——

The Court: Are you going to file the interrogatories?

Mr. Garrison: All the interrogatories and the original depositions.

The Court: It is stipulated that you can use a copy instead of the original.

Mr. Garrison: The one where the original was lost.

Mr. Clark: If the Court please, we are speaking now about the answers by James A. Kenyon to the interrogatories submitted to him. We don't want general terms used in the record here.

The Court: All right; a copy of those particular answers may be filed in lieu of the original.

Mr. Clark: In lieu of the original.

The Court: Go ahead, counsel. What is the next matter?

Mr. Garrison: The next matter is the original

depositions of F. Norman Phelps and Alice Phelps.

The Court: They are here.

Mr. Archer: I have no objection to their filing —to the [31] filing of the original depositions.

Mr. Garrison: Thank you. He doesn't object to them. May they be filed?

Mr. Archer: Are you offering them?

The Court: They have already been filed. What do you want to do?

Mr. Garrison: I would like to offer those original depositions.

The Court: Are there any rulings that the Court would have to make in connection with these depositions, or are you satisfied that they may be deemed read?

Mr. Archer: Well, I would object as to persons other than F. Norman Phelps and Alice Phelps, no proper foundation,——

The Court: I am sorry; I didn't hear what you said.

Mr. Archer: As to defendants other than F. Norman Phelps and Alice Phelps, no proper foundation has been laid in both cases. You are only offering them in 30473?

Mr. Garrison: Yes.

Mr. Archer: I guess both of these people live here.

The Court: You mean as to whether or not there is any basis upon which the depositions could be taken?

Mr. Archer: No, could be read, on the ground that—of course they are defendants; he could read

them as against them. I do not object to that.

Mr. Garrison: What are you objecting to then?

Mr. Archer: There are other defendants besides Mr. and Mrs. Phelps. Are you offering them only as against Mr. and Mrs. Phelps now?

Mr. Garrison: No, I am offering them for all purposes in the record the same as any other depositions. They are depositions of the defendants.

The Court: Were all of the defendants given notice of the taking?

Mr. Garrison: Taken by notice, some by stipulation of counsel.

Mr. Archer: I have no question as to the proper formalities.

Mr. Garrison: They were present and participated. Those I offer in evidence now.

The Court: That is the only objection to the offer in evidence?

Mr. Archer: That is the only objection I have.

The Court: The depositions may be admitted then.

Mr. Garrison: Did you get the answers to interrogatories?

Mr. Archer: I have what is in form a copy of the answers to the interrogatories by Mr. Kenyon.

Mr. Garrison: We understand——

Mr. Archer: I think it will be subject to correction by either side.

Mr. Garrison: There will be no objection if there are some [33] corrections.

Mr. Archer: Is it being offered as though read? Is that the offer?

The Court: Yes, either side can call attention to any answers that they wish or make any point that they wish.

Mr. Garrison: It is in the record. We can read it and the Court can read it.

Mr. Clark: To be sure that we do not get this record all mixed up, my understanding is that the mere fact that the answers to interrogatories are filed does not mean that the answers are in evidence.

The Court: Not unless they are offered; that is right.

Mr. Garrison: Certainly.

Mr. Clark: Not unless they are offered. Has an offer been made?

Mr. Garrison: Yes, I offer them in evidence, as to——

The Court: Is there any objection?

Mr. Clark: No.

Mr. Archer: No objection. I just wanted to know, because there is a difference between filing and offering in evidence. There is no objection.

The Court: Very well, the answers to interrogatories propounded to Mr. Kenyon are then admitted in evidence.

Mr. Garrison: And F. Norman Phelps—the depositions you have already ruled on. [34]

The Court: I have already ruled on that.

Mr. Garrison: There is an original answer to interrogatories of Lawrence Warehouse Company propounded by cross-defendant Capitol Chevrolet, and

the original I believe has been presented. I would like to offer that in evidence.

Mr. Archer: I object to that.

The Court: Of course you can't offer your own answers to interrogatories in evidence.

Mr. Garrison: We would like to have your Honor have the benefit of them.

The Court: That is only a part of the discovery proceeding.

Mr. Garrison: Fine.

The Court: You can't offer them in evidence.

Mr. Garrison: The offer, as far as we are concerned, is made anyway.

We also have answers to interrogatories propounded to Capitol Chevrolet Company and Capitol Chevrolet Co. I would like to offer those in evidence.

The Court: Those answers are already on file.

Mr. Garrison: They are here, I believe. I believe they are in the file.

Mr. Archer: No objection, your Honor.

Mr. Garrison: We are making good progress now.

The Court: I don't know whether they are or not. Someone [35] will have to check the record.

Mr. Archer: If they are not there, the record can certainly be supplemented.

The Court: Those are the answers of Capitol Chevrolet Company and——

Mr. Garrison: Capitol Chevrolet Co.

The Court: Those answers to interrogatories propounded are admitted in evidence.

Mr. Garrison: Now that is our evidence in the second case.

Mr. Archer: I have one question—I don't know whether it is in evidence or not—and that is, I noticed in the file 30473 there was an admission placed in there on the pre-trial conference about a certificate of dissolution of the original Capitol Chevrolet Company. I don't know whether——

The Court: What are you going to offer?

Mr. Archer: I don't know whether it is in evidence or not.

The Court: Well, you are getting ahead of us again.

Mr. Archer: All right.

The Court: All I am trying to do is to find out whether this counsel has now put in the record what he wants in support of both cases.

Mr. Garrison: The only other thing is I would like that the stipulation respecting the attorney's fees be the stipulation [36] also in 30473, so that we have it in both cases.

Mr. Clark: What is the fee? We don't know what the fees are?

Mr. Garrison: Yes, you just stipulated to the attorney's fees.

Mr. Archer: There was some stipulation——

Mr. Garrison: The same stipulation in both cases?

The Court: The cases have been consolidated, and I think that probably any evidence in one case could be considered in the other anyhow.

Mr. Garrison: I think so, but I want to make certain.

Mr. Clark: That is subject to the same reservation.

Mr. Garrison: That is it.

Mr. Archer: I think counsel has stated that he was offering evidence first in one case, and that is the way I understood it.

The Court: All right. Do you want the stipulation with respect to attorney's fees in the other case; is that agreeable?

Mr. Archer: Agreed.

Mr. Garrison: That is the evidence. Shall we take the noon recess and let me check during the noon hour?

The Court: If you have anything further to offer, you can do it after the noon recess, then the other side can offer its evidence. [37]

Mr. Clark: Before your Honor suspends, I would like to ask a question for information. In one statement your Honor made you referred, in connection with the first case, to the admissibility of the transcript. According to your Honor's ruling, you referred to the transcript of testimony, then you went on to say exhibits, and detailed two or three other things. Mr. Archer's objection should cover all of those things. May it be understood that it does?

The Court: Yes, it will be so understood.

Mr. Clark: It was directed specifically to the transcript, although it was made to cover——

The Court: The transcript and exhibits, all of it.

Mr. Clark: All evidentiary matter.

The Court: We will take a recess until two o'clock.

(Thereupon an adjournment was taken until two o'clock p.m. this date.) [38]

Wednesday, March 6, 2 o'clock p.m.

Mr. Clark: Counsel, will you indulge me for just a minute?

Mr. Garrison: Certainly.

Mr. Clark: ——about the stipulation we made this morning.

Mr. Garrison: Yes.

Mr. Clark: A stipulation was made this morning about the amounts paid by the cross-complainant for attorney's fees and costs. The reporter has made a copy of those amounts and the dates and has handed it to me, and I have handed a copy to counsel. I would suggest that this be made a part of the stipulation appropriately, and the Clerk mark it in some appropriate way so the Court will have before it all the figures there.

Mr. Garrison: No objection.

Mr. Clark: As an integral part of the stipulation.

The Court: Mark it as cross-complainant's Exhibit 1 in connection with the stipulation made this morning.

Mr. Clark: And it is admitted, of course, by the defendants in the first case, Defense Supplies Corporation case—well, in both cases—subject to the objection that was made—qualified by the objection that was made, that those were the amounts paid.

The Court: Very well.

The Clerk: Cross-complainant's Exhibit 1 introduced and filed into evidence.

(Thereupon statement of attorney's fees referred to was received in evidence and marked cross-complainant's Exhibit No. 1.)

CROSS-COMPLAINANT'S EXHIBIT No. 1

ATTORNEY'S FEES

Date		Amount	To Whom Paid
January	2, 1948	$3,500.00	Williamson & Wallace
April	20, 1948	750.00	Williamson & Wallace
June	3, 1948	500.00	Williamson & Wallace
September	2, 1948	140.00	Williamson & Wallace
February	9, 1949	35.00	Williamson & Wallace
March	11, 1949	2,500.00	Williamson & Wallace
November	16, 1951	315.00	Wallace, Garrison, Norton & Ray
February	7, 1952	275.00	Worthington, Park & Worthington
	Total	$8,015.00	

COSTS AND EXPENSES

December	15, 1947	$ 770.53	Williamson & Wallace
December	20, 1947	3.44	Williamson & Wallace
February	26, 1948	54.62	Williamson & Wallace
March	12, 1948	32.28	Williamson & Wallace
April	20, 1948	77.87	Williamson & Wallace
May	12, 1948	12.23	Williamson & Wallace
August	9, 1948	4.88	Williamson & Wallace
November	10, 1948	68.90	Pernau Walsh
December	15, 1948	2.19	Williamson & Wallace
March	11, 1949	273.30	Williamson & Wallace
May	4, 1949	85.90	Williamson & Wallace
June	13, 1949	16.20	Williamson & Wallace
October	6, 1950	1.19	Wallace, Garrison, Norton & Ray
March	13, 1951	9.68	Wallace, Garrison, Norton & Ray
April	13, 1951	2.23	Wallace, Garrison, Norton & Ray
June	15, 1951	7.31	Wallace, Garrison, Norton & Ray
August	8, 1951	1.50	Wallace, Garrison, Norton & Ray
		$1,424.25	
August	3, 1949	5.00	(Refund)
		$1,419.25	

Mr. Garrison: Another item of stipulation, and then that is all of the evidence that we desire to offer. Counsel has agreed to stipulate that the judgment that was rendered in favor of the Reconstruction Finance Corporation against the defendants in 23171, Lawrence Warehouse Company, Capitol Chevrolet Company and McGrew, was paid upon December 1, 1951 by the Lawrence Warehouse Company, and that stipulation applies to both cases.

Mr. Clark: So stipulated.

Mr. Archer: So stipulated, your Honor, although I would object to its admission in the first case as irrelevant.

Mr. Garrison: I am incorrect. It should apply only to the second case, because that is the case in which it was rendered.

The Court: Very well.

Mr. Garrison: That is the evidence on behalf of the cross-claimant.

I might say for the record that the amount of that judgment was $58,859.90. [40]

Mr. Archer: Does the cross-complainant rest?

Mr. Garrison: Yes.

Mr. Archer: I should like at this time to ask you about those documents which we talked about over the 'phone this morning between October 1, 1942 and April 15, 1943. You said that all the documents were in your possession. I would like to see those. I should state that we got out three subpoenas in the last two days for officers of the Lawrence Warehouse Company. In one instance, while the Marshal had talked to him over the 'phone before

he went down there, he was absent by the time he got to Lawrence Warehouse.

Mr. Garrison: I didn't hear that. Would you state that again, please?

Mr. Archer: I said in the one instance that the Marshal had talked to Mr. Hanson over the 'phone before he went down to serve him with the subpoena duces tecum, that by the time that he got down there, Mr. Hanson wasn't there. But counsel said he has all the records, so it doesn't make any difference so far as I am concerned, if he will let me look at the records.

Mr. Garrison: Well, let's make certain one thing: Mr. Hanson's being there or not had nothing whatever to do with the conversation with the Marshal. Mr. Hanson is an employee there, available at any time, and he had nothing to do with the records and no knowledge of them, and any inference that he left because of the Marshal's coming is wholly without [41] foundation.

Mr. Archer: Well, I don't intend to make that inference; I just wanted to explain to the Judge why we were asking these documents.

Mr. Garrison: Oh, so I assume it was gratuitous then.

I told Mr. Archer this morning that his belated effort to subpoena correspondence was unnecessary, because we had in our office all the correspondence in this case, and we do have. A great deal of it is wholly immaterial. And if he will tell me what he wants, I will be very glad to produce it. I have the files here, and whatever is material in our opin-

ion to the case, if he can tell me what he wants, we will be very glad to produce it. That statement I made this morning, and he tells me he doesn't know what he wants.

Mr. Archer: No, I stated what I wanted was all the documents between October 1, 1942 and ending April 15, 1943 with respect to the storage and handling of tires by Capitol Chevrolet Company between Lawrence and Capitol Chevrolet Company.

Mr. Garrison: We have some old, old files in the office; there may be some correspondence in there. We would be very glad to make them available to you. Everything that is material was produced at the trial, and I just am at a loss to know what to do. You are welcome to anything that we have if you will tell me what it is. If you want to see our own [42] litigation files and memoranda,——

Mr. Archer: No, I said between Lawrence Warehouse and Capitol Chevrolet Company—or maybe I didn't, but that is what I mean, the documents between those two.

Mr. Garrison: The correspondence between Lawrence and Capitol?

Mr. Archer: Or agreements; any kind of writings or written documents.

Mr. Garrison: I don't know of any. I believe the only documents that exist are the documents that are in evidence in this case. I will be very glad to have a search made to see if there is anything more that might exist, but I don't know of it; I have never seen it.

Mr. Archer: Well, we are particularly interested

in an amendment to the original agreement of October 1, 1942.

Mr. Garrison: Well, now, you are getting down to the point. An amendment to the original agreement?

Mr. Archer: Of October 1, 1942.

Mr. Garrison: That is the contract that is introduced in evidence?

Mr. Archer: No, the reason I say by letters, somebody may have just written a letter, or there may have been a formal agreement; I have no way of knowing.

Mr. Garrison: Do you have a copy of it?

Mr. Archer: No, as I say, I haven't one. [43]

Mr. Garrison: I never heard of it. We would be very glad to look and see if we can find it. We will send Mr. Meadows down right now. Would you go to the office, look in the file, and see if you can find anything that looks like a letter or a contract amending any document relating to the Lawrence Warehouse and Capitol Chevrolet Company, and bring it back immediately, if you can find it.

I might say I called the Lawrence Warehouse this morning and had them check. They say they have nothing over there. Anything that pertains to this is in our office.

I might say that if there is such a thing in existence, I have never seen it, and I don't think it ever came to our attention.

Mr. Archer: Your Honor, I believe that most of the evidence I propose to offer will be self-explanatory as I proceed, but so there will be no

misunderstanding, unless I specifically indicate otherwise, all evidence I offer will be in both actions, both 23171 and 30473. And some of this may be duplication of what has gone in, but I would like to protect the record by offering it.

The first document I have to offer is a copy of the judgment in 23171-G. I offer that as cross-defendant's Exhibit A.

Mr. Garrison: No objection.

The Court: You can put it in evidence, but it is already [44] part of the record.

Mr. Archer: Well, I was referring to 30473.

The Court: All right.

Mr. Archer: Just so that there is no question it is in evidence in both cases. As I say, there may be some duplication. May it be marked?

The Clerk: Cross-defendant's Exhibit A introduced and filed into evidence.

(Thereupon copy of judgment referred to was received in evidence and marked cross-defendant's Exhibit A.)

Mr. Archer: At this time, I should like to read just the third paragraph of that judgment, your Honor.

"Now, therefore, it is ordered, adjudged and decreed that Defense Supplies Corporation, the plaintiff herein, do have and recover from defendants Lawrence Warehouse Company, a corporation, Capitol Chevrolet Company, a corporation, and V. J. McGrew, jointly and severally, the sum of $41,975.15, together with plaintiff's costs and disbursements incurred in this action amounting to the

sum of $196.55." As cross-defendant's exhibit next in order, I offer the findings of fact and conclusons of law in No. 23171-G.

The Clerk: Cross-defendant's Exhibit B introduced and filed into evidence.

(Thereupon findings of fact and conclusions of law in [45] No. 23171-G referred to were received in evidence and marked cross-defendant's Exhibit B.)

Mr. Archer: At this time, your Honor, I should like to read paragraphs 5 and 6 from that document.

"Paragraph V. On April 9, 1943, defendants Lawrence Warehouse Company and Capitol Chevrolet Company failed and omitted to exercise reasonable care and diligence for the protection and preservation of said goods so deposited and stored by the plaintiff in this, that said defendants negligently permitted the use of said torch on said premises and negligently failed and omitted to see that it was used in a careful manner, and to provide adequate protection for said premises and said goods against the use of said torts, and maintained said premises in said goods in a negligent and careless manner so as to permit them to become ignited and destroyed by fire. By reason of such negligence and carelessness said premises and plaintiff's said goods were consumed and totally destroyed by fire.

"Paragraph VI. The negligence of defendants V. J. McGrew, Lawrence Warehouse Company, and Capitol Chevrolet Company concurred and joined together to destroy plaintiff's goods, as aforesaid."

At this time, your Honor, I should like to offer

into [46] evidence the complaint in No. 23171-G, as cross-defendant's Exhibit next in order.

The Clerk: Cross-defendant's Exhibit C introduced and filed into evidence.

(Thereupon complaint in No. 23171-G referred to was received in evidence and marked cross-defendant's Exhibit C.)

Mr. Archer: I should like to read at this time on page 6, and continuing on page 7, paragraphs III and IV of the fourth cause of action in that complaint:

"On or about April 9, 1943, defendants Lawrence Warehouse Company and Capitol Chevrolet Company failed and omitted to exercise reasonable care and diligence for the protection and preservation of said goods so deposited and stored by plaintiff in this, that said defendants negligently permitted the use of said torch on said premises and neglected, failed and omitted to see that it was used in a careful manner, and to provide adequate protection for said premises and said goods against the use of said torch, and maintained said premises and said goods in a negligent and careless manner so as to permit them to become ignited and destroyed by fire. By reason of such negligence and carelessness said premises and plaintiff's said goods were consumed and totally destroyed by fire. [47]

"IV. The negligence of each and all of the defendants concurred and joined together to destroy plaintiff's goods, as aforesaid."

Your Honor will note that that is almost the pre-

cise wording which your Honor used in the finding of fact and conclusions of law.

Mr. Garrison: I should like to say, your Honor, that my failure to object is not because of any acquiescence in the materiality but just simply to save time.

Mr. Archer: As cross-defendant's Exhibit next in order, I offer the answer of defendant Lawrence Warehouse Company and cross-claim against certain defendants in No. 23171-G.

The Clerk: Cross-defendant's Exhibit D introduced and filed into evidence.

(Thereupon answer referred to above was received in evidence and marked cross-defendant's Exhibit D.)

Mr. Archer: At this time I should like to read beginning at page 8, lines 1 to 4, your Honor, to show as it has been previously been shown, that Defense Supplies Corporation charged Lawrence Warehouse Company as being primarily negligent. I am showing, with the portion I am about to read now, that Lawrence Warehouse Company defended on the ground that if it was negligent it was only secondarily negligent.

Beginning at line 1, page 8:

"And for a further and separate answer and by way [48] of cross-claim against the defendants Clyde W. Henry, Constantine Parella and Capitol Chevrolet Company, this defendant and cross-claimant avers as follows:"

And there following is the entire cross-claim

against Capitol Chevrolet Company in the first action, averred not only as a cross-claim but also by way of answer.

Continuing in the same document, your Honor, on the last page, page 11, I should like to read the verification.

"State of California, City and County of San Francisco.

"Clyde Hildreth, being first duly sworn, deposes and says:

"That he is an officer, to wit, secretary of Lawrence Warehouse Company, a corporation, a defendant in the above-entitled action; that he has read the foregoing answer of defendant Lawrence Warehouse Company and cross-claim against certain defendants and knows the contents thereof; that the same is true of his own knowledge except as to the matters which are therein stated on his information or belief, and as to those matters that he believes it to be true. Clyde Hildreth.

"Subscribed and sworn to before me this 8th day of May, 1944. [48-A]

"Hazel E. Thompson,

"Notary Public in and for the City and County of San Francisco, State of California."

Notarial seal.

In view of that verification I should like to turn now to page 4, which is paragraph II, paragraph II commencing on page 3, but I would like to invite your Honor's attention to lines 3 to 8, and I shall read them:

"Incident to said storage and the rental of said premises, plaintiff directed that this defendant employ watchman for the said premises and for the tires and tubes therein stored, and accordingly, this defendant employed and regularly maintained on said premises day and night watchmen of the agency selected and paid for by the said plaintiff." Turning now to page 7, paragraph II, lines 2 through 8:

"That at all times mentioned in plaintiff's complaint, and at the time of the fire therein referred to, plaintiff maintained a watchman on the premises in which plaintiff's said tires and tubes were stored; that said watchman was under the direction and control of plaintiff and was so maintained to protect plaintiff's tires and tubes from loss or damage by fire and from theft or other loss;"

Turning now to page 9, paragraph III of the cross-claim,— [49] this is on a little different subject, and by way of explanation, I should state that the purpose of it is to show that, by this cross-claim which was filed in 1944, Lawrence Warehouse Company sought indemnity and claimed indemnity from Capitol Chevrolet Company. Beginning paragraph III, line 2:

"That at the time of the said fire, this cross-claimant had stored in the said Ice Palace tires and tubes belonging to the plaintiff Defense Supplies Corporation, which said tires and tubes were in the custody and control of cross-defendant Capitol Chevrolet Company, pursuant to the terms and conditions of an agency agreement between this cross-claimant and said Capitol Chevrolet Company there-

tofore entered into with the approval and consent of the plaintiff Defense Supplies Corporation, and wherein said cross-defendant agreed to store and safeguard the storage of such tires and tubes as were received by it from this cross-claimant or plaintiff Defense Supplies Corporation, and to indemnify this cross-complainant against loss or damage to said tires and tubes."

With that in mind, I now offer in evidence what is not a line for line and page for page copy of the answer of Capitol Chevrolet to the cross-complaint of Lawrence Warehouse [50] Company in No. 23171-G.

The Clerk: Cross-defendant's Exhibit E introduced and filed into evidence.

(Thereupon copy of answer referred to above was received in evidence and marked cross-defendant's Exhibit E.)

Mr. Archer: Turning to page 2, paragraph II, which was the answer to paragraph III which I just read of the cross-complaint, to show a repudiation in 1944 of any liability for indemnity by Capitol Chevrolet Company. Paragraph II, line 19:

"Answering Paragraph III thereof, denies generally and specifically, each and every allegation therein contained; save and except, admits that this answering cross-defendant agreed to and did provide space and storage for certain tires and tubes received by it from the cross-complainant and the Defense Supplies Corporation, and in this connection, it is further alleged that the hazards from

and of fire were known, consented to, accepted and assumed by said cross-complainant and the Defense Supplies Corporation."

I should now like to read, your Honor, Interrogatory No. 2 propounded by cross-defendants Capitol Chevrolet Company, James A. Kenyon, and Capitol Chevrolet Co. to cross-complainant Lawrence Warehouse Company. [51]

"Interrogatory No. 2. State whether or not any attorney, officer, agent or employee of Lawrence Warehouse Company was present in the courtroom of Honorable Louis E. Goodman, United States District Judge, on or about February 13, 1945, at a trial of the aforesaid action of Defense Supplies Corporation versus Lawrence Warehouse Company, et al., when the following testimony was given and the following statements were made:

'The Clerk: Will you state your name to the Court, please?

'A. James A. Kenyon.

'Direct Examination

'By Mr. Miller:

'Q. Will you speak out loud, Mr. Kenyon; you are quite a ways away from us.

'A. I will.

'Q. Are you an officer of the Capitol Chevrolet Company, Mr. Kenyon?

'A. I am the owner of the Capitol Chevrolet Company. It is not a corporation. We have no officers.

'Q. You are the owner of the Capitol Chevrolet Company?

'A. Yes.

'Mr. Getz: It was a corporation and was dissolved. [52]

'By Mr. Miller. Q. Were you president of the company?

'A. Yes. We did not dissolve until May 31.'

"If the answer to this question is yes, state the name and relationship of Lawrence Warehouse Company to those who are present on said occasion?"

Reading now from the answer of cross-claimant Lawrence Warehouse Company to the interrogatory propounded by cross-defendants Capitol Chevrolet Company, James A. Kenyon and Capitol Chevrolet Co.:

"State of California,

"City and County of San Francisco.

"W. R. Wallace, Jr., being first duly sworn, deposes and says:

"That he is one of the attorneys for and a director of cross-claimant Lawrence Warehouse Company, and as such is authorized on its behalf to make this answer to the interrogatories propounded by cross-defendant to cross-complainant."

The answer to No. 2—the Court will remember the question of who was present, and if so, whom.

"Interrogatory No. 2. W. R. Wallace Jr., an attorney for Lawrence Warehouse Company, was present at the time of the testimony quoted in said

answer." [53] I think that should be "in said question."

Mr. Garrison: Sir? I wasn't listening. The answer is that he was present?

Mr. Archer: Yes. He says, "W. R. Wallace, Jr., an attorney for Lawrence Warehouse Company, was present at the time of the testimony quoted in said answer."

I think it should be "said question."

Mr. Garrison: It should be "said question."

Mr. Clark: May we have the Court's indulgence for a brief recess of five or ten minutes. If the Court please, I don't think there will be more than twenty-five or thirty minutes in the remainder of the case.

The Court: We will take a brief recess.

(Recess.)

Mr. Clark: Mr. Kenyon, will you take the stand, please.

JAMES A. KENYON

one of the cross-defendants, called on behalf of the cross-defendants, being first duly sworn, testified as follows:

The Clerk: Q. Please state your full name to the court? A. James A. Kenyon.

Mr. Clark: May I have this document marked for identification, if the court please. [54]

The Clerk: Cross-defendant's Exhibit F marked for identification.

(Certified copies of certificates were marked cross-defendant's Exhibit F for identification only.)

CROSS-DEFENDANT'S EXHIBIT F

Capitol Chevrolet Company
Certificate of Election to Dissolve

We, James A. Kenyon, President, and G. M. Westerfeld, Secretary of Capitol Chevrolet Company, a corporation duly organized and existing under the laws of the State of California, do hereby certify that by consent in writing executed by the holders of 650 shares out of a total of 650 shares outstanding and entitled to vote, representing 100% of the voting power of the corporation, filed with the Secretary of the corporation, the corporation has elected to wind up its affairs and voluntarily dissolve.

In Witness Whereof, we have hereunto set our hands and affixed hereunto the Corporate seal of said corporation, this 1st day of June, 1943.

[Seal] /s/ JAS. W. KENYON, President

Attest:

/s/ G. M. WESTERFELD, Secretary

State of California,
County of Los Angeles—ss.

On this 1st day of June, in the year 1943, before me, Fern E. Worman, a Notary Public in and for said County and State, duly commissioned and sworn, personally appeared James A. Kenyon and G. M. Westerfeld, known to me to be the persons whose names are subscribed to the within instru-

Cross-Defendant's Exhibit F—(Continued)

ment and acknowledged to me that they executed the same as President and Secretary, respectively, of the corporattion named.

In Witness Whereof, I have hereunto set my hand and affixed my official seal the day and year in this Certificate first above written.

[Seal] /s/ FERN E. WORMAN,
Notary Public in and for the County of Los Angeles, State of California. My commission expires June 7, 1945.

[Stamped]: Filed in the office of the Secretary of State of the State of California June 21, 1943. Frank M. Jordan, Secretary of State.

[Stamped]: Office of Secretary of State Corporation Number 160624.

Certificate of Winding Up and Dissolution

James A. Kenyon, Gordon A. Kenyon and G. M. Westerfeld hereby certify that they are all of the Directors of Capitol Chevrolet Company, a corporation, and each for himself hereby states that the said corporation has been completely wound up, its known assets distributed and that any and all taxes or penalties due under the Bank and Corporation Franchise Tax Act have been paid, and its other known debts and liabilities adequately provided for, and that the corporation is dissolved.

/s/ JAS. A. KENYON,
/s/ G. M. WESTERFELD,
/s/ G. A. KENYON

Cross-Defendant's Exhibit F—(Continued)

State of California,
County of Los Angeles—ss.

On this 31st day of December, 1943, before me, Fern E. Worman, a Notary Public in and for the County of Los Angeles, State of California, personally appeared James A. Kenyon, Gordon A. Kenyon and G. M. Westerfeld, known to me to be all of the Directors of Capitol Chevrolet Company, and known to me to be the persons whose names are subscribed to the within instrument, and acknowledged that they executed the same.

Witness my hand and official seal.

[Seal] /s/ FERN E. WORMAN,
Notary Public in and for the County of Los Angeles, State of California. My commission expires June 7, 1945.

[Stamped]: Filed in the office of the Secretary of the State of California June 5, 1944. Frank M. Jordan, Secretary of State.

[Stamped]: Office of Secretary of State Corporation Number 160624.

Mr. Clark: I should like to show it to counsel.

Mr. Garrison: No objection to the use of that.

Mr. Clark: I want to offer it in evidence then.

Mr. Garrison: Yes.

Mr. Clark: I offer in evidence, if the Court please, defendant's Exhibit F now marked for identification. It consists of certified copies of two certificates filed with the Secretary of State of the

(Testimony of James A. Kenyon.)

States of California on behalf of Capitol Chevrolet Company, one a certificate of intention to dissolve, the other a certificate of completion. I should like to read at the moment the second one particularly.

Mr. Garrison: We have no objection to that being introduced in evidence, your Honor.

The Court: All right.

The Clerk: Cross-defendant's Exhibit F admitted into evidence.

(Thereupon cross-defendant's Exhibit F for identification only was received in evidence.)

Mr. Clark: I am reading now from the Certificate of Winding Up and Dissolution. I don't want to read the form certificate, because your Honor is familiar with that. I do [55] wish to read the verification for the purpose of indicating in the record specifically the date, or some dates.

"State of California, County of Los Angeles, ss.

"On this 31st day of December, 1943, before me, Fern E. Worman, a Notary Public in and for the County of Los Angeles, State of California, personally appeared James A. Kenyon, Gordon A. Kenyon and G. M. Westerfeld, known to me to be all the directors of Capitol Chevrolet Company, and known to me to be the persons whose names are subscribed to the within instrument, and acknowledged that they executed the same.

"Witness my hand and official seal."

Formally executed.

That was filed in the office of the Secretary of State of California on June 5, 1944.

(Testimony of James A. Kenyon.)

I would like to ask counsel if he will stipulate with me that the complaint of the Defense Supplies Corporation against Capitol Chevrolet Company, Lawrence Warehouse Company and others was filed on February 16, 1944, the purpose of the stipulation being for the second case, not the Defense Supplies Corporation case at all. Your Honor can take judicial notice of that, of course.

Mr. Garrison: That is the fact.

Mr. Clark: Well, subject to correction. [56]

Mr. Garrison: No, that is the fact. The complaint itself shows it was filed on that date. Yes, I will stipulate.

Mr. Clark: And you stipulate. Very well; thank you.

Direct Examination

Mr. Clark: Q. Where do you reside, Mr. Kenyon? A. Palm Springs, California.

Q. And how long have you resided there?

A. Five or six years.

Q. You were the president of Capitol Chevrolet Company before it was dissolved and liquidated, were you not? A. Yes, sir.

Mr. Clark: I am going to ask some leading questions because I think they are harmless, just to lay a little background.

Q. And you know about the contract that Capitol Chevrolet Company made with Lawrence Warehouse Company for the storage of some tires?

A. Yes, sir.

Q. You also know that a fire occurred in the

(Testimony of James A. Kenyon.)

warehouse in which some of the tires, at least, were stored? A. Yes, sir.

Q. And you testified in the case brought by the Defense Supplies Corporation against Capitol Chevrolet Company and others? A. Yes, sir. [57]

Q. Where were the tires stored? Where did the fire take place? At what warehouse?

A. At the Ice Palace in Sacramento.

Q. Inside the city limits of Sacramento?

A. No, in Yolo County.

Q. Prior to the time that tires were stored in the Ice Palace had any tires been stored by you elsewhere for Lawrence Warehouse Company?

A. Yes, sir.

Q. When I say you, I mean the Capitol Chevrolet Company. A. Yes, sir.

Q. Where?

A. In eleven warehouses in Sacramento.

Q. Within the city limits?

A. Within the city limits.

Q. Was the storage of tires at the Ice Palace an additional storage place or in lieu of other storage?

A. It was a consolidation of the tires.

Q. What do you mean by a consolidation?

A. The tires that were in the eleven warehouses were being consolidated and put in the Ice Palace.

Q. In one warehouse? A. Exactly.

Q. Instead of in eleven? A. Exactly. [58]

Q. Do you know why that was done?

(Testimony of James A. Kenyon.)

A. Well——

Q. I am not asking for surmise or anything of that kind; I am asking you for facts. If you don't know, why, say so. A. Actually, no.

Q. Did you have any conversation with any officer or representative of the Lawrence Warehouse Company prior to the consolidation of the storage in the Ice Palace about the consolidation of the storage in the eleven warehouses? A. Yes.

Q. While the tires were stored in the eleven warehouses did the Capitol Chevrolet Company wish to consolidate the storage. A. No, sir.

Mr. Garrison: Object to it on the ground that it calls—I beg your pardon; excuse me. I withdraw the objection.

Mr. Clark: Q. Your answer was what?

A. No, sir.

Q. How did it come about that the storage of the tires was consolidated in the Ice Palace?

Mr. Garrison: Pardon me; that is objected to on the ground that unless it has a foundation laid it will call for hearsay testimony and his opinion and conclusion.

Mr. Clark: We are going to give the conversation in a moment, if the court please, or the substance of it. The question is a little bit improper in form. [59]

The Court: You have asked him for his conclusion as to why——

Mr. Clark: Yes, I did, and I will withdraw that question and start another way.

(Testimony of James A. Kenyon.)

Q. Did you have one or more conversations with anybody representing the Lawrence Warehouse Company about consolidating storage of the tires?

A. Yes, sir.

Q. With whom was that conversation?

A. Bill Hanley.

Q. Who was Bill Hanley?

A. He was the vice-president of Lawrence Warehouse.

Q. Did you have more than one conversation with him about that subject? A. Yes.

Q. Can you distinguish one conversation from the others? A. No.

Q. Tell us what was said in those conversations?

Mr. Garrison: Pardon me; objected to on the ground that no proper foundation laid as to time, place, and persons present.

Mr. Clark: All right, that is correct; I will lay the foundation.

Q. With respect to the time when the tires were stored in the eleven warehouses and the time when the Ice Palace was [60] decided upon by somebody for the consolidation of the storage, when did the conversation or conversations take place?

A. You mean the date?

Q. No. If you can give the date, yes, give it to us approximately.

A. I can't give the date, but it was prior to the leasing of the Ice Palace.

Q. And was it before or after the tires were stored in the eleven warehouses?

(Testimony of James A. Kenyon.)

A. It was after the tires were stored.

Q. All right. And where did the conversations take place?

A. In my office in Capitol Chevrolet in Sacramento.

Q. Anybody else present at any of them?

A. Yes, my brother.

Q. What is his name?

A. Gordon A. Kenyon.

Q. Anybody else?

A. And a man by the name of Baxter from the Defense Supplies Corporation; I don't know his first name.

Q. All right. Were your brother and Baxter present at all the conversations you had with Mr. Hanley? A. Yes, sir.

Q. Go ahead and state as nearly as you can in the language that was used what the conversations were that you had with Mr. Hanley about consolidating the storage? [61]

A. The reason that Lawrence Warehouse Company wanted the tires——

Mr. Garrison: Now, if your Honor please——

The Court: No; just say what the man from Lawrence Warehouse Company said to you.

A. Pardon.

The Court: Rather than what the reason was.

Mr. Clark: I think I can shorten this a little by asking——

The Court: The fellow from the Lawrence Ware-

(Testimony of James A. Kenyon.)

house Company gave you some reason why he wanted them stored in one place?

A. Exactly.

Q. What did he say?

A. The United States Government wanted watchmen twenty-four hours a day on the tires, and we had the tires in eleven warehouses, which would take thirty-six watchmen. By consolidating the tires we could use three watchmen instead of thirty-six.

Mr. Clark: Q. Who could use——

The Court: That was what Mr.——

A. Hanley—Bill Hanley, yes.

Q. That is what he said to you?

A. Exactly.

Mr. Clark: Q. You say "We could use three watchmen [62] instead of thirty-six." Was Capitol Chevrolet Company using any watchmen at all while the tires were stored in the eleven warehouses?

A. No, sir.

Q. Did Capitol Chevrolet Company employ or pay any watchmen after the tires were stored in the Ice Palace? A. No, sir.

Q. Do you remember any of the language used by Mr. Hanley when any of the conversations occurred about consolidating the storage in the Ice Palace? I am trying to find out this, frankly: It is rather a blind question—whether you wanted to store them there or somebody else wanted them stored in the Ice Palace. And when I say you, I mean the Capitol Chevrolet Company.

(Testimony of James A. Kenyon.)

A. The Lawrence Warehouse Company wanted——

Mr. Garrison: I move that be stricken out as a concluson.

The Court: Yes.

Mr. Clark: Q. Well, what did Mr. Hanley say?

The Court: I think he has already answered your question, Mr. Clark.

Mr. Clark: I think he has, really.

The Court: He has already told you what the man said.

Mr. Clark: I think he has really.

Mr. Garrison: Does the answer go out? [63]

The Court: Yes, the answer may go out.

Mr. Clark: Q. Was any inspection made of the Ice Palace by the Lawrence——

The Court: Q. As a matter of fact, it strikes me from your answer that what really happened was that the Government wanted them stored in that warehouse; if they were going to pay for the cost of the watchmen it would be to their interest rather than either your interest or the Lawrence Warehouse Company's, isn't that about right?

A. That would be an assumption and that is what I assumed.

Q. As between you and the warehouse company, it didn't make any difference one way or the other, because you weren't going to have to pay for the watchmen anyhow?

A. Well, insofar as Capitol Chevrolet Company; I don't know whether Lawrence——

(Testimony of James A. Kenyon.)

Q. If you had to pay for the watchmen, then of course it would be advisable to have them in one place. Inasmuch as the Government was going to have to pay for the watchmen I suppose the answer was that it was more to the Government's interest?

A. I don't know whether the Government was paying for it or Lawrence Warehouse was; all I know is that we didn't pay for it.

The Court: All right.

Mr. Garrison: There is no dispute, counsel, is there, [64] that the Government did pay for the watchmen?

Mr. Clark: I don't know what the facts are about that.

Mr. Garrison: I think that is the fact.

The Court: I think that appeared in the record.

Mr. Clark: I believe it is so stated in one of these answers that was read here today.

The Court: Excuse me; go ahead.

Mr. Clark: Yes.

Q. Was any inspection made of the Ice Palace as a prospective warehouse for the consolidated storage of tires by Capitol Chevrolet Company or Lawrence Warehouse Company or any representative of theirs before the storage actually began?

A. Yes, sir.

Q. Who made the inspection?

A. Myself, my brother, Baxter and Hanley.

Q. Did you have any conversations with Mr. Hanley during the time of the inspection?

A. Yes, sir.

(Testimony of James A. Kenyon.)

Q. State the substance of those conversations, please.

Mr. Garrison: Counsel, the time and place.

Mr. Clark: Well, this occurred——

Q. Will you tell us when it occurred?

A. Prior to the signing of the lease or prior to storing any tires.

Q. About the time or prior to signing of the lease on the [65] Ice Palace.

Mr. Garrison: Where?

Mr. Clark: Q. Where?

A. At the Ice Palace and in my office.

Q. In your office. Was anybody present except you, your brother, Mr. Hanley and Mr. Baxter?

A. No.

Q. All right. Now tell us the substance of the conversations.

A. The Ice Palace is outside the city——

Mr. Garrison: I move that that be stricken as not responsive.

Mr. Clark: You have already testified to that.

The Court: I know where it is. Just state the conversation.

Mr. Clark: Q. Go ahead.

A. We agreed that there was no question but what——

Mr. Garrison: Just a minute. If the Court please, I move to strike out what they agreed as not part of the conversation.

The Court: Don't get impatient, Mr. Kenyon.

The Witness: I am not impatient.

(Testimony of James A. Kenyon.)

The Court: You know the witnesses always want to——

The Witness: Tell a story.

The Court: (Continuing): ——make a statement and tell us a story. All the lawyer wants you to do is to just state what was said in the conversation. [66]

Mr. Clark: Just state the substance of what was said if you can't remember exactly what was said.

A. There was a fire hazard in the Ice Palace.

Q. Who said there was?

Mr. Garrison: I move to strike that out as not part of the conversation.

Mr. Clark: Q. Wait a minute. Who said there was a fire hazard there if anybody of the group?

A. That I couldn't say, but it was discussed.

Q. Among the group?

A. Among the group, and as we examined——

Mr. Garrison: Your Honor——

Mr. Clark: Go ahead.

The Witness: I don't know how to explain it.

Mr. Clark: Go ahead; that isn't objectionable.

The Court: You proceed; we will see what the answer is.

A. As we examined the Ice Palace, there was a two inch rubber hose to protect the Ice Palace against fire.

Mr. Garrison: If the Court please, I move that be stricken out as not part of the conversation.

Mr. Clark: Q. Did you have some conversation about that hose?

A. We did have conversation.

(Testimony of James A. Kenyon.)

The Court: State what was said. [67]

A. That is what I am trying to bring out.

Mr. Clark: It will be a part of the conversation.

The Witness: And the hose was rotten and full of holes.

Mr. Garrison: If the court please, I move that be stricken out as not part of the conversation, a statement of fact by Mr. Kenyon.

The Witness: It was part of the conversation.

The Court: That statement of the witness would have to go out. You may state what you said about it, or what anyone present said about the hose.

Mr. Clark: Well, put it this way, Mr. Kenyon,—these things are sometimes difficult—what was done and said by any of the four of you at the time that you mentioned in the presence and hearing of the others? Go ahead and state it.

A. We called from my office after inspecting the Ice Palace, the four involved——

Q. Yes.

A. ——called the chief of the Defense Supplies Corporation in San Francisco and told him that it would be necessary——

The Court: Q. Was that in your presence?

A. The four of us together in my office—and told him that it would be necessary to get a priority——

Mr. Garrison: If your Honor please, I think we ought to know who did the calling and who did the talking.

The Court: Yes. [68]

(Testimony of James A. Kenyon.)

The Witness: Mr. Baxter.

Mr. Garrison: And what did he say?

Mr. Clark: Now if you will just wait, we will get this conversation out in time.

Q. Go ahead, Mr. Kenyon.

A. That it would be necessary for the Government to give us a priority to get new hose for the Ice Palace, because there was a fire hazard and the hose was rotten and full of holes.

Q. Is that all that occurred at that time?

A. After that conversation——

Q. Go ahead.

A. We—the four of us agreed that it was all right to sign the lease.

Mr. Garrison: Now, if the Court please, what they agreed is a conclusion.

Mr. Clark: Q. Did each of you say to the other, or didn't you, that you would sign the lease?

A. We did.

Q. Did you say anything else to each other?

A. First, this is nine years ago——

Q. Yes.

A. Second, we wouldn't say, "We will sign the lease," without saying further that "We will now transfer the tires from the eleven warehouses to the one warehouse." [69]

Q. That is right; yes. Now your contract that you made—that Capitol Chevrolet Company made with Lawrence Warehouse Company, provided for payment for storage of a certain number of cents for tires and a certain number of cents for tubes.

(Testimony of James A. Kenyon.)

Did you receive any additional compensation from Lawrence Warehouse Company incident to the consolidated storage? A. Yes, sir.

Q. Explain that, please.

A. We were receiving three cents a tire from the Lawrence Warehouse for receiving and storing the tires. When it came to the consolidation I made an agreement with the Lawrence Warehouse to receive seven cents a tire to transfer them from the eleven warehouses into the Ice Palace.

Q. Were you paid seven cents?

A. Yes, sir.

Q. For the transfer? A. Yes, sir.

Q. At the rate of seven cents for the transfer of the tires? A. Yes, sir.

Q. Was that agreement in writing, or do you remember? A. That I don't know.

Mr. Clark: That, incidentally, is what I wanted to find out by that subpoena duces tecum, whether or not that seven cents agreement was in writing.

Mr. Garrison: Oh, I see. [70]

The Court: He has testified that he got paid anyway.

Mr. Clark: It was an executed oral agreement anyway at the worst.

I think that is all.

The Court: Any questions, counsel?

Mr. Garrison: I have no questions on cross.

I do have questions of this witness, however, in respect to issues in the second case. I would prefer to reserve that examination until we finish.

(Testimony of James A. Kenyon.)

The Court: You mean by way of rebuttal?

Mr. Garrison: No, it is evidence in connection with those issues. It isn't proper cross-examination at this moment. I will put Mr. Kenyon on——

The Court: I thought you had rested.

Mr. Garrison: I have, but I didn't know Mr. Kenyon was here. As a matter of fact, I have been looking for him a long time.

Now I would like to call him under 2055 at a later time, and if he is going to be in the court-room, I will address myself to your Honor in that connection. If he is going to be here it would be more in order if I put him on later rather than now.

Mr. Clark: Mr. Kenyon told me last night that he was going to get his reservations to go away to-night; I don't know whether he has got them. [71]

The Court: Whatever he wants to ask him, he will have to ask him today.

Mr. Garrison: Yes, I will ask him today.

The Court: You may step down.

Mr. Clark: No cross-examination?

Mr. Garrison: No cross at this time.

Mr. Clark: That is the case for the defendants.

The Court: Do you wish to re-open your case?

Mr. Garrison: Now may I have the privilege of re-opening?

The Court: What do you want to do?

Mr. Garrison: I want to ask Mr. Kenyon some questions regarding the dissolution first of the Capitol Chevrolet Company, the transfer of its assets

to the stockholders, the assumption of the liabilities by those stockholders of those assets.

Mr. Clark: Haven't you got those answers already? Those are in the answers to the interrogatories.

Mr. Garrison: No, they are not quite satisfactorily. The formation of a partnership; the subsequent transfer of those assets to a new corporation——

The Court: That wouldn't take very long.

Mr. Garrison: No, it won't. And the ultimate transfer out of himself of all interest in the Capitol.

The Court: In order that everybody's record may be complete [72] before we get to arguing this matter, put Mr. Kenyon on now.

Mr. Archer: But let us note an objection on behalf of the cross-defendants in both cases to any further testimony. It is certainly improper rebuttal.

The Court: There is no question about that, it is improper rebuttal.

Mr. Clark: I am afraid it is in the discretion of the court to permit it.

The Court: The court will certainly permit additional evidence. Apparently this is on another subject matter.

JAMES A. KENYON

recalled as an adverse witness by the cross-claimant, and having been previously duly sworn, testified as follows:

Mr. Garrison: Q. Mr. Kenyon, you say your residence is in Palm Springs?

(Testimony of James A. Kenyon.)

A. That is right.

Q. Have you spent any substantial time there in the year 1951?

Mr. Clark: That is immaterial, if the Court please, if that is his residence, it doesn't make any difference how long he spends there.

Mr. Garrison: Very well.

Q. You do also have a residence in Acupulco, Mexico, do you [73] not? A. No, sir.

Q. You have been there just recently, have you not? A. Yes, sir.

Q. Going back to the formation of Capitol Chevrolet Company, were you one of the incorporators of that corporation? A. Yes, sir.

Q. And it was formed on October 1, 1942, was it not? Well, not the exact date, but approximately that time.

A. It was formed in May, 1936. Now whether it was changed in '42, I couldn't tell you the dates without looking in the records.

Q. You were the owner of one-half of the stock of that corporation from the beginning?

A. No, sir.

Q. Some time prior to 1942 you did acquire one-half of it, did you not? A. Yes, sir.

Q. And the other half of the stock was owned by the Adams Service Company at that time?

A. At that time, yes, sir.

Q. And those two interests continued the ownership until that corporation was dissolved on May 31, 1942?

(Testimony of James A. Kenyon.)

A. That isn't quite true. I owned thirty per cent of the company; and James A. Kenyon, trustee for my daughter, owned [74] twenty per cent of the company, and the Adams Service Company owned fifty per cent of the company.

Q. That is in the first Capitol Chevrolet Company? A. No, that is in the second one.

Q. I am only talking about the Capitol Chevro- Company before 1942. A. All right.

Q. Before May 31, 1942.

A. The General Motors Holding Corporation owned $80,000 out of $85,000; I owned $5,000.

Q. Do you recall your answers to the interrogatories, Mr. Kenyon, filed in this action and as part of this record? And I will ask you if you were asked these questions and gave these answers:

The answers do not carry the question with them, so I have to refer to both documents:

"Q. Were you a stockholder of Capitol Chevrolet Company at any time between October 1st, '42 and June 5, '44? If so, how many shares of stock of said corporation did you own and on what date?"

The Court: You are talking about a different corporation now.

Mr. Garrison: No, I am talking about the Capitol Chevrolet Company.

The Court: Yes, but the question you just asked him [75] referred to his ownership of stock at the time that the company was dissolved on May 31st.

Mr. Garrison: Yes, but that goes back prior to

(Testimony of James A. Kenyon.)

that, that was 1942. This is the first company, the only one I have had any reference to—Capitol Chevrolet Company as distinguished from Capitol Chevrolet Co. The Capitol Chevrolet Co. was not incorporated until some time later.

The Court: Do you understand that?

The Witness: May I explain this to you?

Mr. Garrison: No; I will ask the questions. I am referring only to Capitol Chevrolet Company, which I understood was incorporated some time prior to October 1st, 1942. A. Correct.

Q. And was dissolved May 31st, 1942?

A. Correct.

Q. Is that correct? A. Correct.

Q. Now the question in the interrogatory——

The Court: That is not clear to me. You say it was organized prior to 1942 and dissolved in '42.

Mr. Clark: '43 it was dissolved.

Mr. Garrison: My typographical error; it was '43.

The Court: All right.

Mr. Garrison: Q. The question was:

"Were you a stockholder of Capitol Chevrolet Company [76] at any time between October 1st, 1942 and June 5, 1944? If so, how many shares of said corporation did you own and on what dates?

"A. I was a stockholder of Capitol Chevrolet Company at all times between October 1st, 1942 and June 5th, 1944. During this period I owned 325 shares of the 650 shares outstanding."

Is that correct?

A. That is correct.

(Testimony of James A. Kenyon.)

Q. That refreshes your memory about it?

A. Maybe I misunderstood your question. You said prior to 1942.

Q. Well, I am now talking between '42 and the time of the dissolution. A. That is correct.

Q. The other half of the corporation was owned by Adams Service Company?

A. That is correct.

Q. During that period. Now is it a fact that the Capitol Chevrolet Company was dissolved May 31, 1943? Is that correct?

A. That would be in the record.

Q. I beg your pardon?

(The Reporter read the question.)

Mr. Clark: The certificate shows that.

Mr. Garrison: If you don't recall, I can check the record [77] on it. Do you recall——

A. It is—as far as I know, I don't remember the date, but it is in the record.

Mr. Garrison: All right.

The Court: The certificate is dated June 1st.

Mr. Garrison: The date it was filed. I think it is May 31st——

Mr. Archer: On the certificate of dissolution——

The Court: The certificate of election to dissolve is dated June 1, 1943 and it was not filed until June 21, 1943 in the office of the Secretary of State.

Mr. Garrison: The exact date isn't important to my questions anyway.

Q. At any rate, between May and June, '43 it was dissolved? A. Correct.

(Testimony of James A. Kenyon.)

Q. And did you, as one of the stockholders, assume the liabilities of Capitol Chevrolet Company on its dissolution? A. Yes, sir.

Q. And did you receive the assets of the corporation? A. My share.

Q. You received one-half? Now, in what manner did you, as one of the shareholders, assume the liabilities? Were documents executed or were bonds posted or money deposited? A. No, sir.

Q. What was done? [78]

A. Morally we assumed it.

Q. I beg your pardon?

A. Morally we assumed the obligations.

Q. Did you do any act in connection with that?

A. No, sir.

Q. What happened happened, is that right?

A. That is what we did.

Mr. Garrison: Let the record show I am shrugging my shoulders and the witness shrugs his in return.

The Court: I don't know whether that has any particular meaning or not. It may show it.

Mr. Garrison: Well, it might.

Q. Now, Mr. Kenyon, what was done with respect to the business of the Capitol Chevrolet Company upon the dissolution of the corporation? What happened to it? What happened to the assets?

A. They stayed in the company. They stayed in the new company.

Q. What was the new company?

A. Capitol Chevrolet Company.

(Testimony of James A. Kenyon.)

Q. Was that a corporation or a partnership?

A. Partnership.

Q. In other words, did you form then a partnership? A. We did.

Q. And who were the partners? [79]

A. James A. Kenyon, James A. Kenyon Trust, trustee, and Adams Service Company.

Q. Did that partnership receive the assets of the former corporation? A. Yes, sir.

Q. And did the Adams Service Company also assume the liabilities of the Capitol Chevrolet Company? A. Yes, sir.

Q. And how did they assume those liabilities? By any act on their part? A. No, sir.

Q. Did the business continue to operate as it had before, under the partnership? A. Yes, sir.

Q. And how long did that partnership function?

A. Until April, 1946.

Q. And then what happened?

A. Then we formed a corporation.

Q. What was the name of that corporation?

A. Capitol Chevrolet.

Q. That is the Adams Chevrolet Co.?

A. Pardon?

Q. Co.—Adams Chevrolet Co.?

A. Capitol Chevrolet Co.

Q. I mean Capitol Chevrolet Co. [80]

A. Yes, sir.

Q. Who were the stockholders in that corporation?

(Testimony of James A. Kenyon.)

A. James A. Kenyon, James A. Kenyon Trustee, Adams Service Company.

Q. Were the interests the same, fifty-fifty?

A. Yes, sir.

Q. Now after that did your ownership of the Capitol Chevrolet Co. change, or that of your trust?

A. Yes, sir.

Q. What change occurred?

A. I sold it all.

Q. You sold it all? A. Yes.

Q. Did you sell the stock held in the trust?

A. Yes, sir.

Q. Was there also a J. A. K. Company?

A. Yes, sir.

Q. What was that?

A. That was a holding company in Nevada.

Q. Who owned the stock of that company?

A. I did.

Q. Did it own some stock in the Capitol Chevrolet Co. A. It owned all my stock, yes.

Q. And did you sell all of that stock out of that corporation? [81] A. Yes, sir.

Q. And all of the stock held in the trust?

A. Yes, sir.

Q. And to whom did you sell it?

Mr. Clark: That is immaterial, isn't it?

Mr. Garrison: I don't think so.

Mr. Clark: I don't think it makes any difference. He says he sold it.

Mr. Garrison: I know, but let's find out who acquired it. I think it might be interesting.

(Testimony of James A. Kenyon.)

Q. Who acquired your interest?

A. I think that the Capitol Chevrolet Company acquired it.

Q. In other words, it was purchased by the corporation? A. I think so.

Q. As I understand it, then, at the time you assumed the liabilities of the first Capitol Chevrolet Company there was no deposit of money made any place for the payment of those liabilities?

A. No, sir.

Q. No bond posted to secure their payment?

A. No, sir.

Q. And the ultimate fact is that you transferred out of your name and out of the name of your trust all of the stock of that corporation?

The Court: I think probably what you did was you must [82] have made some entries in the minutes of the corporation.

The Witness: It could be.

The Court: That you would provide for the liabilities, because I notice——

Mr. Archer: That is correct, your Honor.

The Court: Because I notice the certificate which you signed, if you will look at it says that.

The Witness: Of course we agreed to assume the liabilities.

Mr. Archer: That is in the answers to the interrogatories.

The Court: Oh, it is?

Mr. Garrison: Q. Now do you know Mr. and Mrs. Phelps? A. Yes, sir.

(Testimony of James A. Kenyon.)

Q. Are they the principals in the Adams Service Company?

Mr. Clark: Just a moment. I object to that on the ground——

Mr. Garrison: He says he doesn't know.

Mr. Clark: ——the term "principals" make it ambiguous. What is a principal?

The Court: He says he doesn't know anyway.

Mr. Garrison: He says he doesn't know.

Q. Does the J. A. K., your holding corporation, still exist? A. No, sir.

Q. Does the trust by your daughter still exist?

A. Yes, sir. [83]

Q. Was there any change in the assets of the corporation, the Capitol Chevrolet Company, as it was transferred from that corporation to the partnership? A. No, sir.

Q. In other words, the physical aspects of the corporation remained the same?

A. Yes, sir.

The Court: Q. The partnership carried on the business? A. Exactly.

Q. And then again the business was transferred again to the second corporation and it carried on in the same way? A. Yes, sir.

Q. It sounds to me like you had a tax lawyer, did you not? A. Yes, sir.

Mr. Clark: Correct.

Mr. Garrison: Q. And since July of 1950 you have had no interest in the Capitol Chevrolet Co.?

(Testimony of James A. Kenyon.)

A. No, sir.

Q. Do you know of any fund or place where the liabilities of the Capitol Chevrolet Company can be satisfied?

Mr. Clark: That is immaterial and irrelevant. Wait until he gets judgment, which he may get, and levies execution.

The Court: I suppose it might be subject to a lawsuit.

Mr. Garrison: He assumed them personally. I am wondering [84] if, having assumed them, as the Code says, in good faith, and having provided for their payment——

The Court: Maybe he would be responsible for the payment of them.

Mr. Archer: That calls for his conclusion, if you are asking him. One of the questions——

The Court: I think you probably are trying to find out whether he is financially responsible to pay it. Is that what you mean?

Mr. Garrison: No; the corporation provides that on dissolution the shareholders must in good faith make provision for the payment of the liabilities of the dissolved corporation.

The Court: Of course the obligation of the stockholder himself might be sufficient in that regard if he is financially responsible.

Mr. Garrison: Well, yes, but unless they have some place where they can go—I assume to make provision in good faith means there must be some place where those liabilities can be satisfied.

(Testimony of James A. Kenyon.)

The Court: Or an agreement of a responsible person to pay them.

Mr. Garrison: Yes. And here is a man who has dispossessed himself of the stock of the corporation.

The Court: He may still have the responsibility to pay [85] them.

Mr. Garrison: He says he made no provision.

The Court: I don't think you can convert this proceeding into an order of examination in that regard, as if there were a judgment.

Mr. Garrison: No, I can't, but I can test on whether or not he made provision in good faith for the payment of the liabilities. He says he didn't do anything about it and the Code says he must.

The Court: I don't think he said that.

Mr. Garrison: He said he assumed them morally, yes.

The Court: I think he said he did assume them.

Mr. Garrison: But he made no provision for them, and the Code says that he must in good faith make provision for their payment.

The Court: It says the corporation must do that.

Mr. Garrison: No, the shareholder, who receives the assets, must in good faith make provision for the payment of their liabilities.

Mr. Archer: He did that.

Mr. Garrison: I am trying to find out if there is any place——

The Court: What you want to find out is if at that time the witness set aside any funds or property?

(Testimony of James A. Kenyon.)

Mr. Garrison: Yes; he says he didn't. [86]

Q. I take it you did not.

A. We did not.

Q. And then the only question I can ask him is, what provision did you make in good faith for the payment of those obligations, if any there were?

A. We didn't make any.

Mr. Clark: You assumed them, didn't you?

A. We assumed the responsibility and if I owe anybody——

Mr. Archer: He had all the assets.

The Court: Q. You consider yourself bound to pay any debts the corporation did not pay; is that right? A. I do, sir.

Mr. Garrison: But the assets that he received were then in turn transferred to another corporation. But that is a matter of argument.

The Court: I think that is a matter we are not confronted with now, counsel.

Mr. Clark: No.

Mr. Garrison: That is all.

The Court: You have no questions?

Mr. Clark: No.

The Court: That is all.

Does that conclude the record so far as you wish to make it?

Mr. Garrison: I would like to ask Mr. Meadows what he [87] did when he went to the office, what he found with respect to the documents that you requested.

Mr. Clark: The case is over now; it doesn't make any difference.

Mr. Garrison: You are not interested? He didn't find anything anyway.

The Court: Mr. Kenyon has said that he got seven cents. That seems to be the matter Mr. Clark was interested in. It has come in already.

Now you have completed your record so far as evidence is concerned on both sides?

Mr. Garrison: Yes.

Mr. Clark: Yes.

The Court: You wish to argue it now?

Mr. Archer: Yes, we are prepared to argue it.

The Court: Well, suppose you each make an argument as to your contentions, and then if you wish to submit further written argument, you may.

Mr. Garrison: I think, your Honor, that the points are of sufficient importance and interest that I think your Honor will want us to brief them, and we will be very happy to do so. I think it would be helpful if we did make some comments.

The Court: It would be very helpful to me if before you file any written memorandum in the matter, if that is what you [88] wish to do, to just make some short statement as to the points at issue.

Mr. Clark: I think Mr. Archer is prepared to do that now.

Mr. Garrison: Shall I?

The Court: Suppose you lead off on that.

Mr. Garrison: All right. Thank you.

It is our position, your Honor, that the evidence in the case clearly establishes that there was no

negligence on the part of Lawrence Warehouse Company; that the fire was caused by the acetylene torch by a man being permitted to go in there without supervision and without protection — an act which we had no connection with and didn't even know about. I think that that will probably be admitted, because never in the first trial or since has it ever been contended that Lawrence Warehouse was negligent.

The fact of the thing was that when that case was finished, the findings were prepared by the Government for your Honor's consideration, and of course they stated them in language which would be sure to hold in Lawrence Warehouse. And the Lawrence Warehouse should have been held in if there was negligence on the part of Capitol, because the duty that Lawrence Warehouse owed to the Government was non-delegable; it owed that duty if any of its agents were negligent, because under the Warehousemen's Law of California it couldn't [89] divest itself of responsibility. So those findings were made, and I can assure your Honor that they in no way at all will embarrass us in the ultimate disposition of this case, either, first, because they are not against either disposition your Honor might want to make of it, and secondly, because they are entirely consistent with any conclusion your Honor reaches.

I take it that the serious point that is raised here, as set out in the pleadings, is the fact that because the findings say that Lawrence Warehouse and Capitol were negligent and that negligence joined

and concurred, creates a situation, first, that they were joint tort feasors and that there can be no contribution, and, secondly, that the findings are supreme and cannot be even considered in any other light than that they were joint tort feasors.

We are dealing then with a problem, as I see it, where there is no negligence on the part of the principal; and we have to assume that if there is no negligence on the part of the principal and the agent is negligent, the principal is entitled to indemnity either, first, on an applied agreement to indemnify which exists in every principal and agency relationship, and in this case upon the express hold harmless indemnification agreement which I referred to this morning.

So we must ask ourselves then, in the light of this objection, do these findings tie your Honor's hands in passing upon this cross-complaint in this first action and [90] prevent your Honor, even though you do not feel that Lawrence was negligent, from deciding that Lawrence is entitled to a judgment against Capitol on its indemnity agreement? We say that the answer is clearly, "No."

In the first place the only thing that can be considered in a plea of res judicata which they make here is the judgment itself. The Code of Civil Procedure, Section 1911 provides that the judgment is the thing that must be looked at in order to test of whether or not the same issues have been decided between the same parties and therefore cannot be relitigated.

The judgment in this case says simply that Law-

rence Warehouse and Capitol are liable to the Government for X dollars. It doesn't say whether it is on the basis of joint negligence or on the basis of the doctrine of respondeat superior or what. So our first point is that the plea of res judicata must be decided upon that, on that judgment, not upon the findings. That is Section 1911, and the case approving that section is Purcell vs. Victor Power, 29 Cal. App., 504. I am not going to go into the detail of these cases, because we will do it in the brief.

Now if a judgment is being tested,—and of course I need not cite any authorities, I am sure, to your Honor that it must be tested in the light of supporting what it sets out to do,—every intendment is in its favor; if it is ambiguous, you can go behind it and look at the record to find out what [91] was in the court's mind in making the judgment. If it is not ambiguous, then the judgment speaks for itself, and if there are two theories under which the judgment could have been rendered in a litigation, the theory must be adopted which validates the judgment and gives it effect. So that if your Honor could have held in this case that the liability of Lawrence to the Government was that of a superior for the delict of its agent, that theory is just as consistent and is just as valid in supporting and analyzing this judgment as it would be that they were joint tort feasors.

Now if it could be argued that the judgment is in any sense ambiguous or inconsistent or for any reason not clear, then the court—this court or a reviewing court—may look back to the findings or the

pleadings or the evidence to find out if it can be cleared up, and if there is anything at all that will give clarity to it, that must be adopted so that the judgment is supported.

In this case, fortunately, that very thing has been done. The Circuit Court of Appeals, in affirming your Honor in this case, analyzed these findings and this judgment and said that while the point was not very clear as to whether or not Lawrence had been held because of negligence as a joint tort feasor or for some other reason, the Circuit Court of Appeals had no difficulty in having clear in its mind what was in your mind. And reading from the opinion which appears [92] in our transcript at page 375, the Circuit Court said this:

"Now if Capitol was negligent in safeguarding the goods, it follows as a matter of course that the dereliction is imputable to its principal Lawrence. The latter argues that Capitol's negligence, if any, was not shown to be within the scope of its authority as an agent and that there was no finding that it was. While the findings are not specific in this respect, the trial court's opinion shows that the decision as against Lawrence was grounded on imputed negligence. The facts of the case and the terms of the agency fully support that conclusion. Capitol or Lawrence, and in certain instances both, attempted to disclaim responsibility on the basis of the circumstances said to be peculiar to this case.

"We turn now to those special circumstances. One of them relates to the fact that the corporation"—which is the Government—"approved the selection

of the Ice Palace as a place of storage. We may assume that approval would relieve the warehouseman had some known defect in the premises been the cause of the loss, but such is not thought to be the situation here. The loss resulted from the use of the acetylene torch."

So if anyone wants to suggest that the judgment is not [93] clear and wants to go into the findings, I for one do not want to say that they ought to be interpreted in any different way than our Circuit Court of Appeals did, because they may have a chance to do it again, and I think it is fair to assume that they would read it in the same light. At any rate, that is fairly respectable authority for the fact that the basis of the liability of Lawrence not only could be, but couldn't be on any other basis than of imputed negligence of its agent.

Now I have discussed this——

The Court: Well, I do not think there is any doubt about that. The only question that your opponent raises is whether or not the judgment and the findings themselves, despite the fact that the court puts its decision on a different ground, would foreclose any resort to the opinion of the court or evidentiary matter.

Mr. Garrison: Well, I say that——

The Court: It seems like it pretty well simmers down to that question, because they always speak of these things as the findings of the court. We are still living in the old archaic world; we are naive enough to believe that Circuit Courts follow the practice of naively believing that the findings are the findings

of the court. They are not. They are prepared by the lawyers.

Mr. Garrison: That is right.

The Court: And if they don't prepare them well, then the [94] law falls upon them. Although some of us sometimes prepare our own findings, but most of the time the lawyers want to do that because they want to be sure that they protect their position. And sometimes they don't, and then they speak of them as the court's finding. It is like speaking of the court's instructions to juries in the State Courts. They are the lawyer's instructions, they are not the judge's instructions. In the Federal Courts we don't follow that as far as instructions are concerned; but as far as findings are concerned, I think most of the judges always take the findings the lawyers prepare, because, after all, it is their case, they have spent time on it; we take it for granted that they have considered the problems that are involved and are seeking to adequately protect their own rights. Of course these findings in this case, as I remember, were prepared by the plaintiff——

Mr. Garrison: By the Government.

The Court: The Government prepared the findings.

Mr. Garrison: That is right. We have no quarrel with the findings. We do not think there is any problem in connection with them. I am simply discussing this now because it has been raised and it has an answer.

In a minute I am going into the proposition that a finding of negligence against Lawrence presents

no difficulty whatever, because they were not tort feasors and the indemnity [95] liability could not arise unless there had been some fault on their part which created the judgment against them that they could collect. I am going to go into that in just a second.

The Court: Your point is, I take it, that when the court says, or when the lawyers say in the finding, that the negligence of the defendants McGrew, Lawrence Warehouse and Capitol Chevrolet concurred and joined together to destroy plaintiff's goods, that that does not necessarily mean that the negligence of the Lawrence Warehouse is referred to there as a kind of actual operative negligence, but rather it is the kind of negligence that the law stepped in and said——

Mr. Garrison: Exactly.

The Court: That it was the kind of liability described as negligence that the law stepped in and said that existed because of the imputation to them of the responsibility for the agent's acts.

Mr. Garrison: As the court said, it is imputed negligence; that is right. But I say, going a little back of that point—that is where we come to next—going back of that point they have raised a plea of res judicata. Res judicata under the Purcell case, is tested by looking at the judgment, not the findings. Now the judgment doesn't go into the theory behind the liability, it just says there is a liability. And that liability could have been imposed by reason of the doctrine of [96] respondeat superior as readily as on the basis of joint negli-

gence. It simply says there is a liability. So you test the plea of res judicata on the judgment, not the findings, and there is nothing about the judgment that creates any difficulty at all. The only time you look at the findings, I believe, is when the judgment is in doubt and there is a conflict.

The Court: Of course if this wasn't a judgment and finding of joint negligence, you wouldn't have a right to recover.

Mr. Garrison: Yes, I would.

The Court: As a joint tort feasor.

Mr. Garrison: Well, that is my next point.

The Court: All right.

Mr. Garrison: That is my next point. I am discussing this now quite aside from the basic point.

The Court: I see.

Mr. Garrison: I would have a right to recover without question; but I do want your Honor to have clearly in mind my point that the judgment and not the findings is the document that you look to on the question of the plea of res judicata.

The Court: I see.

Mr. Garrison: And that doesn't go into the question of negligence or imputed liability; it just simply goes into the [97] question that a liability existed, and it doesn't say——

The Court: It doesn't say anything about joint tort feasor.

Mr. Garrison: No, not a word. It could be on one theory or the other, as the judgment must be supported if there is any theory upon which it can be sustained.

The next question is, are we entitled to judgment against Capitol if we will assume in the judgment you had said that we were guilty of concurring negligence? And there isn't any question but that we are, so long as we are not joint tort feasors in the sense that we were independently negligent actors which, without any relationship to each other, our negligence was equal to the other defendants, and came together and created——

The Court: That is the same thing I just tried to say. You are saying the same thing I said about a minute ago when I said that if you were joint tort feasors that you couldn't recover, I meant that the law is settled that if you are actually a joint tort feasor you couldn't recover.

Mr. Garrison: That is right. That is right. Let's put it this way: if Lawrence's agent had been driving its automobile down the street and Capitol had been driving its automobile into an intersection, and they had collided and injured a third person, you see, then they are joint tort feasors and there can be no contribution between them. But we are not in [98] that situation here.

We are talking about indemnity between principal and agent. And the liability of the indemnitee does not arise until there is a judgment and some fault found on the indemnitee's part before they can ever recover against its indemnitor.

And I might say that this is probably as interesting a subject as you will find in a long time in dealing with the average case you come into. It is a point that sometimes people pass over by the glib

statement that "Joint tort feasors, no contribution; let's go to the next order of the day."

But starting back in 1895, the Supreme Court took up this question and discussed it very thoroughly in the case of Washington Gas Light vs. District of Columbia, 161 U.S., 316. And that is the beginning of the line of cases which has set up the indemnity contribution arrangement where the relationships are similar to those existing there and even where there is some fault on the part of the indemnitee.

The classical case is the one that happened in the Washington Gas Light case where a plaintiff was injured by having stepped into a hole in the sidewalk that had been created there by a gas box top that had been left off by the gas company. And they sued the District of Columbia, and of course recovered against the District of Columbia because the District of Columbia had an obligation imposed by law to [99] keep the streets safe. The District of Columbia turned right around and sued the gas company, and the court said that even though the District of Columbia might be negligent, it has a right to recover against the person who was primarily negligent, who was actively negligent, and whose active negligence created the condition that brought about the injury; and they started then the doctrine of active and passive negligence, primary and secondary, and determined that wherever a liability arises on someone because of the act of another for whom they are responsible, even though they may themselves be guilty of some fault, with-

out even a contract on the imputed liability, if the person primarily negligent, actively negligent, created the condition, and the liability of the indemnitee is simply one coming because of their passive fault. They go into the question of moral turpitude, the question of good faith and knowledge, and so forth. A great many cases are cited in this Gas Light case where they talk about the liability imposed because of the law and the relationship, and they distinguish very clearly between the joint tort feasor and this other indemnity arrangement. That case isn't too long, and when we file our brief we hope to discuss it in detail for your Honor. And I commend it to you as very interesting reading.

We are very fortunate in this case here in having this whole subject very beautifully analyzed for us by our own Circuit Court of Appeals in the case of Booth Kelly vs. [100] Southern Pacific. And it is a case so close in point that I wonder why the parties do not have the same name. It originated up in Oregon, or Washington, I believe. It was a case in which the Booth Kelly Company was a lumbering operation, and they entered into a contract with the Southern Pacific whereby the Southern Pacific agreed to run a line along their property, and they entered into an agreement in relation to the use of that track whereby it was agreed that the Booth Kelly would hold the Southern Pacific harmless from any loss or damage as is the case here, by reason of its neglect or that of its employees, and then it said that if it develops that in a given situation both the Southern Pacific and Booth Kelly are

negligent, then the loss to anyone sustained should be borne equally between them.

Well it happens that one of the brakemen on a Southern Pacific car moving on this track was injured by reason of a wood cart having been left closer to the track than the contract said they should, within a certain number of inches, and it struck the brakeman. The brakeman was injured and sued the Southern Pacific and recovered. So the Southern Pacific in turn is suing its indemnitor, as we are, and in the damage case the court found that the Southern Pacific was negligent because of failing to discover the condition and to warn the brakeman of it; that it had a duty to provide him a safe place to work and it had not done so; therefore it was guilty [101] of some negligence. So this case now is an action by Southern Pacific against Booth Kelly, its indemnitor, and every point raised here is in this case. In the trial, the District Court, the judge, concluded that if both of them were negligent and they had a provision in their contract of indemnity that they divided equally, that was pretty good for him, so he decided that they were both to take the judgment half and half. This court said no, that that wasn't what was contemplated in that agreement, what was contemplated in that agreement was a full indemnity; and it reversed the District Court and held that Booth Kelly should reimburse the Southern Pacific entirely for its loss in the payment of the judgment. And it goes on to explain very logically and very properly why. The court says in its decision——

The Court: I take it that the reason why they said that was because of the fact really that it was the negligence of the Booth Kelly Company.

Mr. Garrison: The primary, active negligence was on Booth Kelly, but there was some negligence on the part of the Southern Pacific, but it was not the negligence contemplated in their indemnity agreement; the indemnity agreement contemplated that there would be full indemnity. And the Court goes on to say—and I would like just very shortly to give you some of that language because it is very illuminating. It says: "Basic in any determination of the meaning of [102] this whole paragraph"—this indemnity paragraph—"is an understanding that when the parties contemplated that there might be claims for indemnity, cognizant of the fact that in the ordinary case the occasion for seeking indemnity would not arise unless the indemnitee had himself been found guilty of some fault, or otherwise no judgment could have been recovered against him. That this is typically true is recognized in the comment under Section 95, Restatement on Restitution. That comment is"——

Quoting from the Restatement——

"'In all of our situations the payor'"—who is Lawrence in our case and the Southern Pacific in that case—"'is not aware of the fact that he was negligent in failing to discover or to remedy the defect as a result of which the harm was occasioned. In most of the cases it is because of this failure that he is liable. The fact that the payor knew of the existence of the dangerous condition is not of itself suf-

ficient to bar him from restitution. In many cases it is only because he had knowledge of the condition that he is liable to the person harmed.' ''

This is from the court, going back to the decision:

"If we were to assume that the existence of any negligence on the part of the Southern Pacific, [103] without regard to whether it be active or passive, primary or contributory necessarily threw the case within the last portion of the paragraph"—which is the one where they are fifty-fifty held equally—"then one might fairly ask, what sort of case must have been contemplated when the parties drew the first portion of it? as pointed out in that comment quoted in the Restatement. In most cases a liability which which indemnity is sought can arise only because the person claiming it was himself guilty of some negligence. In approaching a determination of the meaning of this whole paragraph, it appears to us initially that each part of the paragraph was intended to cover certain types of cases and that each part refers to a situation different from that contemplated by the other, and in view of the fact that in most cases where demand for indemnity arises, the claimed indemnitee must have been found liable by reason of some negligence, we think it extremely unlikely that all such cases were intended to be excluded from the operation of the first portion"—which is the full indemnity—"otherwise, this portion of the paragraph would have little or no application to any actual case."

The Court: Then goes on to refer to the com-

mon law relating [104] to indemnity and contribution and cites the Washington Gas Light case.

The Court: I didn't want to interrupt you, but I will have to look at that case anyhow.

Mr. Garrison: Well, yes, you will.

The Court: I understand that point. And all I had in mind was just a statement of the points.

Mr. Garrison: All right, but this is so very, very much on this case that I just wanted to read from it.

Counsel has cited a number of statutes of limitation. I won't extend the discussion on that, but the point is this: This indemnity agreement indemnified Lawrence against loss or damage. The cases are very clear that we are not entitled to indemnity until we have a loss or we are damaged, and the cases say that that loss or damage is payment of money. We didn't have to pay this money until we paid the judgment. Therefore, the statute could not start to run until that date, which was just here a few months ago. So the cases are very clear, and we will include those in our memorandum.

I think that that very briefly covers the points.

The Court: I understand the point.

Mr. Archer: May it please the court, we have already filed with our motions to dismiss a memorandum of points and authorities which sets out what would be called the law points in this case. I think you will find it attached to the motion [105] in 30473.

Now as to the meaning of the judgment. I agree with counsel that the judgment is conclusive in a

plea of res judicata; but the word "jointly" in there, as specifically held in this Adams vs. White Bus Line, means that there is no contribution. In other words, when this judgment was drafted, counsel used a word of art in California law, there is just no doubt about it. And the point there is that if Lawrence Warehouse was liable only on a respondeat superior theory, it was secondarily liable and a several judgment against each was all that could be given. A joint judgment against tort feasors is allowed, as said in this Adams against White Bus Line, only when they both particiipate and are primarily negligent.

Now I say that without reservation. And I took some time in the case to read the pleadings in the first action, because I say this was done designedly, because I think that is what counsel for Defense Supplies Corporation was doing. They averred joint and concurrent negligence and, as I pointed out, Lawrence Warehouse, by way of answer as well as cross-complaint, said, "No; if we are liable at all, we are only secondarily liable."

Now, your Honor, the cases in the California law —I have cited them—Salter vs. Lombardi, Bradley vs. Rosenthal, and Fimple vs. Southern Pacific, show conclusively [106] that when a master and servant are joined as defendants for a tort, the issue of the primary or secondary liability of the master is inevitably in issue, because the question of exoneration arises. That is, if the agent is set free —if it had been found there were no negligence on the part of Capitol from the standpoint of Defense

Supplies Corporation, if there had been only respondeat superior, that would have left both defendants out as between Lawrence and Capitol. On the other hand, with a finding——

The Court: Say that again. If there had been no what?

Mr. Archer: If it had been only on the theory of respondeat superior that Lawrence was held, and it was determined on appeal or subsequently that as a matter of fact Capitol was not negligent, as a matter of law, under California law that would have exonerated Lawrence.

The Court: I follow that.

Mr. Archer: That is clear. That is Hornbook law. On the other hand, if you had a finding of concurrent and joint negligence, as these cases state there could be no exoneration. And that is why Defense Supplies Corporation put that point in issue: Is Lawrence primarily or secondarily negligent? And that is why Lawrence Warehouse defended and said, "No, if we are negligent—if we are liable, we are only secondarily so." And the court answered, came right back with the findings and conclusions and judgment that said, "You were primarily liable." Now, your Honor, under the law of California these cases I have cited, there is just no——

The Court: I follow you on that, but I think the main question is, can you go behind that judgment.

Mr. Archer: Now we come to the question of whether it is conclusive.

The Court: Under the cases of master and servant, of course the judgment would apply.

Mr. Archer: All right. All right. I would like to state of course that it doesn't work conversely; that as far as the servant is concerned, it doesn't make any difference whether his acts are directed or not; in other words, if his acts were directed, he is entitled to indemnity from the principal but it doesn't affect his liability as to the others.

Actually this judgment is conclusive for several reasons.

In the first place, as a matter of evidence. As I stated before this morning, it is a question of the parol evidence rule, the rule of integration. It is In Re Crosby Stores Circuit Judge Swan lays the rule out right straight from Wigmore that judgment is a rule of compulsory integration. It is more so. People enter into negotiations; they don't have to make a contract; but when people enter into a trial and introduce evidence, the judge has to integrate that into the judicial record, which is conclusive on the parties and cannot be contradicted. As I say, you can have [108] additional evidence.

And then in this Louisiana Land and Exploration case, on page 4, they just set forth the general rule that in any event it cannot be contradicted.

The California cases that I have cited will show conclusively that the words "joint," "joint liability", and "joined" and the "acts joined and concurred together," preclude any possibility of liability on the theory of respondeat superior, and that if this court goes to the evidence to find liability as to whether it was solely on the theory of re-

spondeat superior, it will be contradicting the judicial record. And that just cannot be done.

And in fact, your Honor, the Court held that if the reason for the judgment and findings and conclusions was as counsel says against Lawrence Warehouse solely on respondeat superior, it was reversible error to enter a joint judgment against them and to say that their acts—and in finding No. 7 your Honor mentioned something about omission to act, or something like that—it says, "The acts of the defendants joined and concurred together—it was reversible error."

And at that point, if an appeal had ever been taken—as you know, there was a lot of conversation after your Honor spoke, but your Honor gave the final word in this case—if a proper appeal had been taken, it would have been reversible if that had been the only basis of judgment against [109] Lawrence.

The Court: The judgment should have been a several judgment?

Mr. Archer: It should have been a several judgment, and it should have said that Lawrence was negligent——

The Court: I guess there again the court has got some excuse for its opinion, maybe right or wrong.

Mr. Archer: If your Honor please, Lawrence Warehouse Company approved the judgment as to form.

And when it comes to counsel preparing it, there certainly was an adverse interest between Capitol

Chevrolet Company and Lawrence Warehouse Company when the findings and conclusions and judgment were prepared. And counsel for Capitol Chevrolet Company were entitled to rely that that was the judgment of the court, regardless of the opinion, regardless of the evidence or anything else: But that was what the court was ruling, and when they said they were joint and concurrent tort feasors that was what the court meant.

The Court: The question maybe should have been raised by the defendants.

Mr. Archer: Well, not by Capitol Chevrolet Company.

The Court: No.

Mr. Archer: That is exactly the point, your Honor; if a decision is res judicate, it is res judicate if it is dead wrong. There's no question about that. This is a [110] collateral attack on a judgment, there is no way of getting around that.

I have said before that this judgment was conclusive because of the rule of evidence: One, it was integrated; second, you can't contradict it.

The Court: Of course counsel read from the decision of the Court of Appeals which rested its affirmance upon the ground that the judgment against that——

Mr. Archer: There was nothing in the Court of Appeals. The Supreme Court says the action abated, the notice of appeal was properly filed.

The Court: No, no, that isn't what I mean, Mr. Archer. I mean the original case was appealed and the Court of Appeals affirmed it, in affirming it the

opinion recognized, as I recall the reading of it, that the basis of the judgment as against Lawrence was on the doctrine of imputed negligence.

Mr. Archer: Well, that may or may not be true; in other words, Lawrence may not have argued this other question, I don't know that; but the absolute answer to it is that the Court of Appeals opinion was of no legal effect. And in that opinion they said they didn't think the findings and conclusions were consistent with that. There was the clear opening. Of course they couldn't do anything, because there wasn't any party against whom the appeal was taken.

The Court: That is right. If Lawrence did not raise [111] that point on appeal and asked the court to modify the judgment to make it a several judgment instead of a joint judgment, of course then the Court of Appeals was not concerned with that, as long as the plaintiff was entitled to a judgment against both defendants.

Mr. Archer: Suppose the Court of Appeals had said it wasn't entitled to a judgment; suppose the Court of Appeals had said that your Honor found incorrectly, that there was no negligence, that would have no legal effect, because when it went up to the Supreme Court, the Supreme Court said there was a judgment rendered within the one year period, the Defense Supplies was never substituted, there was never any adverse party to that appeal and the proceedings in the Court of Appeal were of no effect, just as though nothing were done. So even if they ruled entirely against you on the evidence,

that opinion wouldn't mean anything, because there is only one judgment in this case, and that is the one you rendered on April 15, 1946. There was a lot of conversation after that, but that is the law. And if you had been reversed, it would have gone to the Supreme Court on behalf of the Government, where, in effect, the Supreme Court says, "You are not properly before us because there is no party here, you weren't properly before the Court of Appeal. The only thing to do is for the Reconstruction Finance to sue on the judgment" which was entered by your Honor. [112]

The Court: That is a little beside this case.

Mr. Archer: I just wanted to say that that opinion——

The Court: I am not so sure about that. We cannot agree about that.

Mr. Archer: I want to say that the opinion of the Court of Appeals is of no legal effect.

The Court: It really comes down—the strength of your argument really rests in the inviolability, as it were, of the words of this judgment, and if they stand your point is that there is no ground for relief here.

Mr. Archer: I say that is our principal point,—principal law point.

The Court: If you can go behind that, then there wouldn't be any doubt as to the real basis of the decision.

Mr. Archer: Now there you are. We are prepared to argue this on the evidence that Lawrence Warehouse Company undertook to provide watch-

men and that every act that Capitol Chevrolet Company did was under the direction of Lawrence Warehouse Company. In other words, no matter what this agreement says—I admit it does say some things—but subsequent to that—whether you want to review the acts subsequent to that as an executed parol agreement or the fulfilment of the principal directing the agent to do particular things, I don't think it makes much difference, but it was a principal and agent relationship. So that when, as between Lawrence and Capitol, where there [113] was this relationship, which wasn't between Defense Supplies and Lawrence or Defense Supplies and Capitol, when Lawrence said to "change your place of storage from your eleven warehouses to the Ice Palace to suit our convenience and we will provide watchmen," that in effect Lawrence undertook to do acts which he directed Capitol Chevrolet which he had no alternative to do.

The Court: The agreement between the Capitol Chevrolet Company and the Lawrence Warehouse Company was executed before the goods were first stored in the eleven warehouses?

Mr. Archer: That is right. That is right, your Honor, and the obligations of Capitol Chevrolet Company were set when there were eleven warehouses, but then when Lawrence came in and said, "Put them in the Ice Palace and we will provide watchmen," then the obligation had changed, and that, your Honor, is why I think that the Defense Supplies Corporation from the very first—and we have just been discussing at the very end of the case

—maintained the Lawrence Warehouse Company was a joint tort feasor because she had directed specific acts of Capitol Chevrolet Company and had undertaken to provide watchmen.

The Court: Of course what you have last said was really not actually before the Court at the time of the judgment in the first case.

Mr. Archer: Well, your Honor, certainly not until—— [114]

The Court: Your man, Mr. Kenyon, testified, but I don't recall there was any testimony about that in the other case.

Mr. Archer: Well, no, your Honor. Of course that has been our position from the beginning of this thing on the evidence. I mean that is raising another point here; but the issue of primary and secondary liability as far as Lawrence is concerned was in issue, but it certainly wasn't in issue as far as Capitol was concerned in this case. So on that evidence you could say as between the two—that is why we have objected to the court's allowing in this other evidence, because that was not an issue as far as Capitol was concerned although it was an issue as far as Lawrence was concerned. And it is Capitol against whom this evidence is offered. That is why we are producing testimony here now.

There is just one other point as far as the conclusiveness of that judgment, and that is the doctrine in Bernhard vs. The Bank of America which is cited on page 5 of our memorandum, in which California took a step out of the way from the law of the other states and said that a party can assert

the defense of res judicata even though it, the party asserting the defense, was not a party to the prior action as long as the party against whom it is asserted was a party. I don't have to dwell upon that because Bernhard against Bank of America is undoubtedly the law of California. It is not the law of Oregon; it is probably not the common law of [115] the United States, if there is any.

But I think that is another reason why the judgment is conclusive, because, as I pointed out, this issue of the primary or secondary liability of Lawrence was in issue between Lawrence and the Defense Supplies, because Lawrence expressly put it in issue. And that shows not only by the pleadings, but the judgment and findings so state.

As far as the agreement for indemnity goes, as I have pointed out, the obligation of Capitol Chevrolet Company undoubtedly changed when the storage was changed to the Ice Palace.

The second point I wanted to make in that regard was that the agreement did not enlarge or diminish the duty as between master and servant, because the agreement expressly provides that it would indemnify against loss or damage resulting from a failure on the part of the agent to perform any of the duties or obligations above set forth—in other words, the agent being Capitol.

Now just two final points, neither of which I have touched on before.

In considering this case I want the court, as I know the court will, to consider you have Capitol Chevrolet Company, who is a party in the original

action, and you have everybody else going out in two branches: on one side Mr. Kenyon, on the other side Adams Service Company as being successors to [116] Capitol Chevrolet Company.

Now it is the law—I think I can state it faster by reading; this is from the Court of Appeals of the Ninth Circuit, stating the law of California in Boulter vs. Commercial Standard Insurance Company. I haven't cited that in my memorandum. As I say, this is primarily a question of evidence and what is admissible against certain defendants. At page 768, the court said:

"Finally, appelle argues that the court should have upheld its plea of res judicata in which it set up its declaratory judgment. Notwithstanding that the Boulters were never served in the declaratory judgment suit, it is asserted that they are bound by that judgment because, it is argued, they were in privity with Warner. The rights which the Boulters acquired under the policy became vested long prior to the institution of the suit for declaratory judgment. Under the law of California which controls here, a privy is one who, after rendition of the judgment, has acquired an interest in the subject matter affected by the judgment through or under one of the parties."—citing the Bank of America case.

"Further this court has quoted Freeman on Judgments, Section 162, to the effect that no one is in privy whose succession to the rights of property [117] thereby affected occurred previously to the institution of the suit."

So at this posture of the suit in both cases—no, only in the second case,—I can say there is just no evidence against anybody but Capitol Chevrolet Company, because the verification on that certificate of dissolution shows that dissolution had taken placed in 1943, one month before the original complaint by Defense Supplies Corporation was filed. These parties had acquired their interest before the institution of the suit.

Now if there were any way you could get around that—I mean your Honor may feel in some way disposed to get around that—well, it is up to the plaintiff and cross-complainant in the first case to prove his case by competent evidence—if he felt there were any way to get around that. That is why we have put into the record the portion where Mr. Kenyon very frankly stated that the company had been dissolved at the trial, and Mr. Getz also stated it, his counsel. And right there was just a red flag waving where counsel at that time to protect his rights had to move then to make these other persons parties to the judgment, and it was not done.

The Court: The corporation had already been dissolved?

Mr. Archer: That is right; it had been dissolved before the complaint of Defense Supplies had been filed. So there is just no evidence against these people, none at all. [118]

Now we have pleaded the Statute of Limitations.

The Court: Then it might have solved a great deal of everybody's troubles if a judgment in con-

tribution were ordered against the original Capitol Chevrolet Company.

Mr. Archer: Your Honor, of course that point——

The Court: But that is all your opponents could win in the case.

Mr. Archer: I couldn't raise that point. I don't know how the cross-claimant intended to prove its case. I do want to say: We are not denying liability. If I have an obligation and you assume it, you certainly are liable, but you are liable if somebody brings an action against me and recovers.

The Court: Wouldn't the liability of the corporation arise at the time that the cause of action arose?

Mr. Archer: Yes, your Honor, but I am talking about evidence. I am not saying that if competent evidence weren't introduced against the people who assumed the liability that they wouldn't be liable. As I say, if I have an obligation and you assume it, and somebody gets a judgment against me and then sues you, they still have to prove their case all over again.

The Court: I see.

Mr. Archer: And that is all I am saying, and that there is no evidence at all against those people which is admissible.

We have a reserved motion to strike, and we are going to [119] move to strike every bit of evidence against everybody but Capitol Chevrolet Company because there is just no basis for allowing it to come in.

The Court: There is evidence that Mr. Kenyon was a shareholder——

Mr. Archer: No; he acquired his interest prior. That was the certificate which we have put in evidence.

The Court: Yes, but not prior to the time that the cause of action arose.

Mr. Archer: Well, as the case I read stated, it is anybody who acquires their interest prior to the institution of the suit, not prior to the time of the cause of action. Actually, the law in California is that nobody is bound by a judgment unless they acquire their interest after the judgment.

The Court: That is on account of the doctrine of notice, I suppose?

Mr. Archer: It is not only notice, your Honor; but suppose that I buy property with the worst kind of notice that somebody else has some rights to it; if somebody brings an action against me, I am still entitled to my day in court and judgment on the law and the evidence. The fact that I have notice of some other judgment or some other lien is part of the proof to come in when they sue me.

The only other point I think is the question of the Statute of Limitations. Your Honor will remember that I read [120] to the court the portion wherein the cross-claim in the original action Lawrence Warehouse Company had claimed that Capitol Chevrolet Company was liable, and that Capitol Chevrolet Company denied liability. Well, naturally, the Statute did not begin to run in 23171, because that is still the same action; that tolls the action.

But I have a case here which holds expressly in an indemnity agreement situation where the indemnity is against loss and damage to hold harmless, that where there is a repudiation, the cause of action accrues at that time. That case I do not have in the memorandum, but I will put it in the one that we submit. It is Wahl vs. Cunningham, 320 Missouri, 57, 6 S.W. (2nd), 576. And in that connection——

The Court: What is the date of repudiation here?

Mr. Archer: In 1944 when the pleadings in the first case were filed. With a written agreement, five years would be '49 against everybody who isn't in the first case; that means everybody but Capitol Chevrolet Company.

The Court: Do you think that might be a repudiation?

Mr. Archer: Well, I can't think of a clearer repudiation. I mean there is certainly no question about it.

The Court: In other words, the denial of liability?

Mr. Archer: Yes, they pleaded it, that they had agreed to indemnify. They said Capitol Chevrolet Company had agreed to indemnify Lawrence Warehouse Company, and Capitol Chevrolet [121] Company denied that.

The Court: That is attaching considerable significance to a pleading.

Mr. Archer: I think it is attaching a significance to it in the most significant place where you can attach it, your Honor—right in court where they

are trying to collect. I mean, it would be so much conversation, perhaps, and revocable if you put it elsewhere, but on the fact of the election to sue, considering that doctrine, and you have the whole question of indemnity and notice to the defendant, and that sort of thing—when you put it in that kind of language——

The Court: That really only affects the rights of these other people.

Mr. Archer: That is right. That is right. It doesn't affect Capitol Chevrolet Company, because obviously it is not tolled in the first action. I think that is a summary of my points.

Mr. Garrison: May I take a couple of minutes to reply? I am just unable to resist, your Honor.

The Court: Yes.

Mr. Garrison: Because counsel has stated his points with such positiveness and finality that it is challenging.

On this thing about the judgment joined, and being all conclusive and settles all discussion, let me just read one [122] short line in an A.L.R. notation, which is very complete, as A.L.R. is when it deals with a subject, and we will give it to you in the brief:

"As between the several defendants therein, that is, in the first suit brought by the injured plaintiff against the present party defendants, a joint judgment establishes nothing but joint liability to the plaintiff. Which of the defendants should pay the entire judgment or what proportion each should pay

in each case in which he is partly liable is still unadjudicated."

The Court: Was that a case of principal and agent?

Mr. Garrison: That was a case where they held they were jointly responsible as joint tort feasors.

The Court: Your opponent's point I think is more directed to the application of that doctrine where there is a master and servant relationship, a principal and agent relationship, rather than in a case where there are just two ordinary joint tort feasors.

Mr. Garrison: I understood him to say that where you have the term "joint" in the judgment, it precludes any possible contribution, because not being several, it shows that there were joint tort feasors and it can't have contributions. That just isn't the law. In Hardy vs. Rosenthal, 2 Cal. App. (2nd), a very recent case where that [123] very situation arose, the parties involved themselves were sued, the defendants; judgment was rendered against them, and one was permitted to recover against the other.

The Court: You have said there are cases the other way on that point.

Mr. Garrison: I certainly do.

Now this point about people's interests coming in subsequently. What he is talking about is the interests of the Phelps coming in subsequently, and the Adams Service Company being the party in interest prior. The testimony of Mr. and Mrs. Phelps in these depositions, which we rely upon, on that sub-

ject is to this effect: Mrs. Phelps was the president; she never attended a meeting; the corporation never had an office; it had no books or records; she never recalls signing anything; she never participated in any way; she doesn't know why she was in it; she doesn't know whether the corporation still exists; she doesn't know whether it has any assets; she doesn't know where her stock is or if she ever got any; all she did was to do what her husband told her to, and she said, the lawyers.

Her husband, who owned the other half of Adams Service Company, testified in the deposition he knew nothing about the corporation, it was a lawyer's deal; he went along with it and signed the papers; it never had an office; he doesn't know where his stock is; he doesn't know when he acquired an [124] interest; he thinks it has some assets, but he doesn't know. And that is the corporation owned by Mr. and Mrs. Phelps entirely which was the interest that they say existed before they came in. If anybody reads those two depositions and says that corporation had any reality over and above the interest of Mr. and Mrs. Phelps, then I want to hear about it. They had a corporation purely for tax purposes; they owned it entirely; it never existed in fact; it was purely a fiction and that is very clear from those two depositions. So that is the fact regarding that.

The Court: I have got a pretty good idea what the case is about anyhow. I can probably do a better job with the briefs when I get them. I think I would prefer that you make these points with the

cases that support them. I would much prefer, if you don't mind, if you will just cite the cases and state what your view is as to the possible law involved. It is much easier for the court to follow that kind of brief, because I can always look up the cases myself. I am always more interested in what the lawyers might have to say than what they think some court had to say about it.

Mr. Archer: You mean you don't want us to set the cases out?

The Court: I want you to cite the cases, but I don't want you to say what they hold.

Mr. Archer: You mean to cite them but not to quote [125] extensively.

The Court: It makes it too hard to read. I have to look at the cases anyhow.

Mr. Archer: I understand.

The Court: I think most judges agree that they get more out of attorney's briefs when you say what you think about it. We can always look at the cases and see whether you are telling the truth; but when you have to read those long excerpts you get——

Mr. Archer: You have to go back to the case anyhow.

The Court: Mr. Garrison: I think you are filing the opening?

Mr. Garrison: Yes.

The Court: How much time do you wish?

Mr. Garrison: I think ten days is all we need.

Mr. Archer: I would have to ask for twenty days after receipt because of the connection with Los Angeles.

Mr. Garrison: That is all right.

The Court: Then ten, twenty, and ten to reply; is that satisfactory?

Mr. Archer: Yes, your Honor.

Mr. Garrison: Yes, your Honor.

The Court: The case will be submitted on that basis.

[Endorsed]: Filed March 11, 1952. [126]

No. 13840. United States Court of Appeals for the Ninth Circuit. Capitol Chevrolet Company, a corporation, Appellant, vs. Lawrence Warehouse Company, a corporation, Appellee. James A. Kenyon, Adams Service Co., a corporation, F. Norman Phelps and Alice Phelps, Appellants, vs. Lawrence Warehouse Company, a corporation, Appellee. Transcript of Record. Appeals from the United States District Court for the Northern District of California, Southern Division.

Filed: May 15, 1953.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for the Ninth Circuit.

In the United States Court of Appeals
for the Ninth Circuit

No. 13840

CAPITOL CHEVROLET COMPANY, JAMES A. KENYON, ADAMS SERVICE CO., F. NORMAN PHELPS and ALICE PHELPS,
Appellants,

vs.

LAWRENCE WAREHOUSE COMPANY,
Appellee.

STATEMENT OF POINTS ON WHICH JAMES A. KENYON, ADAMS SERVICE CO., F. NORMAN PHELPS AND ALICE PHELPS WILL RELY

1. The Judgent and Findings of Fact (Findings, Nos. V, VI and VII) and Conclusions of Law (Conclusions, Nos. I and II) are unsupported by the evidence, in that absolutely no evidence was offered or admitted against appellants showing that Capitol Chevrolet Company breached any duty to Lawrence Warehouse Company, incurred any obligation to Lawrence Warehouse Company, or caused any damage or loss to Lawrence Warehouse Company.

2. The Court erred in holding that the judgment in favor of Lawrence Warehouse Company against

Capitol Chevrolet Company in No. 23171 was binding on the above-named appellants because:

(a) Said judgment was not pleaded nor offered in evidence against said appellants;

(b) Said judgment was based solely on the evidence adduced at the trial of the complaint of Defense Supplies Corporation against Lawrence Warehouse Company, Capitol Chevrolet Company, et al., in which said appellants did not participate and were not given the opportunity to participate and did not defend on behalf of Capitol Chevrolet Company;

(c) Said appellants are not in privity with Capitol Chevrolet Company;

(d) Said appellants are not parties to said judgment;

(e) Said judgment was rendered subsequent to the trial of this action; and

(f) Said judgment was not a final judgment.

3. The Court erred in holding (if it did so hold) that the judgment in favor of Defense Supplies Corporation against Lawrence Warehouse Company, Capitol Chevrolet Company, et al., was binding on appellants because:

(a) They were not parties to said judgment nor in privity with any party to said judgment, nor did they defend on behalf of anyone who was a party to said judgment; and

(b) They did not participate in the trial in which evidence supporting said judgment was adduced.

4. The Court erred in finding (Findings, No. VIII) that James A. Kenyon and Adams Service

Co. actively participated in the defense of the complaint of Defense Supplies Corporation against Capitol Chevrolet Company because this question was never pleaded or otherwise placed in issue and because there is absolutely no evidence, and none was offered, on this issue.

5. The judgment against Capitol Chevrolet Company in No. 23171 must be reversed, thereby resulting in a reversal of the judgment in this action.

6. The Court erred in failing to find that Lawrence Warehouse Company was equally, jointly and contributorily negligent or negligent in any of said ways with Capitol Chevrolet Company or was solely negligent in causing the damage for which judgment was rendered in favor of Defense Supplies Corporation in Civil Action No. 23171, if said Capitol Chevrolet Company were negligent at all or if any negligence of said Capitol Chevrolet Company caused or contributed to the cause of said damage and in finding to the contrary (Findings, Nos. VI, VII, XIII, XVII, XVIII, XIX, XXII, XXIII) because:

(a) Lawrence Warehouse Company expressly directed Capitol Chevrolet Company to store tires and tubes of Defense Supplies Corporation in the "Ice Palace" knowing of its fire hazards;

(b) Lawrence Warehouse Company undertook to provide and did provide watchmen for the "Ice Palace" whose duty it was to protect tires and tubes of Defense Supplies Corporation from damage by fire and who had actual knowledge of the acts of

V. J. McGrew which caused the damage to said tires and tubes;

(c) Lawrence Warehouse Company, having participated in the trial of the complaint of Defense Supplies Corporation in No. 23171, is bound by the determinations therein that its acts joined and concurred in causing the damage to the tires and tubes of Defense Supplies Corporation (See Findings, No. XVI).

7. The Court erred in finding (Findings, No. XX) as not true that Capitol Chevrolet Company had no dominion or control over the lessors of said "Ice Palace" or over said V. J. McGrew or Charles Elmore because as to said appellants no evidence was offered or admitted on this question.

8. The Court erred in finding (Findings, No. X) that on November 21, 1951, Reconstruction Finance Corporation recovered judgment against cross-claimant Lawrence Warehouse Company and cross-defendant Capitol Chevrolet Company in the amount of $42,171.70 plus interest at the rate of 7 per cent per annum from April 15, 1946, to and including November 21, 1951, and costs in the amount of $20.00, and in finding (Findings, No. XI) that on or about December 1, 1951, while said judgment was still in force and unsatisfied, cross-claimant, Lawrence Warehouse Company, paid plaintiff Reconstruction Finance Corporation the sum of $58,859.90 in full satisfaction and discharge of said judgment in favor of said plaintiff because:

(a) Said judgment was not, and is not now, final but is subject to revision at any time, inasmuch as

all the claims in Action No. 30473 have not been disposed of.

9. The Court erred in finding (Findings, No. VIII) that F. Norman Phelps and Alice Phelps, or either of them, were the alter ego of Adams Service Co., or otherwise liable for the obligations of Adams Service Co.

10. The Court erred in failing to hold that the cross-claims of Lawrence Warehouse Company were barred by the statute of limitations (C.C.P. sec. 337(1)).

11. The Judgment, Findings of Fact and Conclusions of Law are unsupported by the evidence.

12. For the foregoing reasons the Court erred in granting judgment in favor of Lawrence Warehouse Company and in refusing to grant judgment in favor of appellants, and each of them (Conclusions, Nos. I, II).

Dated: San Francisco, May 25, 1953.

/s/ HERBERT W. CLARK,
/s/ RICHARD J. ARCHER,
/s/ MORRISON, HOHFELD, FOERSTER, SHUMAN & CLARK,
/s/ JAMES B. ISAACS,
/s/ DEMPSEY, THAYER, DEIBERT & KUMLER,

Attorneys for Appellants James A. Kenyon, Adams Service Co., F. Norman Phelps and Alice Phelps

[Endorsed]: Filed May 25, 1953. Paul P. O'Brien, Clerk.

[Title of U. S. Court of Appeals and Cause.]

DESIGNATION BY APPELLANTS JAMES A. KENYON, ADAMS SERVICE CO., F. NORMAN PHELPS AND ALICE PHELPS OF PORTIONS OF RECORD

1. The following Docket Entries in No. 30473: Nos. 1, 4, 7, 9, 13, 14, 17, 18, 20, 21, 25, 26.

2. Complaint of Reconstruction Finance Corporation filed April 12, 1951, in No. 30473.

3. Answer of James A. Kenyon filed May 28, 1951, in No. 30473.

4. Answer and Cross-Claim of Lawrence Warehouse Company filed June 6, 1951.

5. Judgment filed November 20, 1951, in No. 30473.

6. First Amended Answer of Capitol Chevrolet Company, James A. Kenyon and Capitol Chevrolet Co. to Cross-Claimant of Lawrence Warehouse Company filed January 4, 1952, in No. 30473.

7. The following portions of the transcript of hearing on January 8 and 9, 1952:

(a) Page 3, lines 1 to 24;

(b) Page 28, line 17, to and including page 29, line 24;

(c) Page 63, line 10, to and including page 65, line 8;

(d) Page 68, line 20, to and including page 69, line 13.

8. Amendment to Cross-Claim of Lawrence Warehouse Company filed February 15, 1952, in No. 30473.

9. Answer of Capitol Chevrolet Company, James A. Kenyon and Capitol Chevrolet Co. to Amendment to Cross-Claim of Lawrence Warehouse Company filed February 5, 1952, in No. 30473.

10. Motion of Capitol Chevrolet Company, James A. Kenyon, Capitol Chevrolet Co., F. Norman Phelps and Alice Phelps to Dismiss Cross-Claim of Lawrence Warehouse Company filed March 5, 1952, in No. 30473.

11. Answer of F. Norman Phelps and Alice Phelps to Cross-Claim of Lawrence Warehouse Company filed March 5, 1952, in No. 30473.

12. Answer of F. Norman Phelps and Alice Phelps to Amendment to Cross-Claim of Lawrence Warehouse Company filed March 5, 1952, in No. 30473.

13. Reporter's Transcript of Proceedings on March 5, 1952, including Exhibit F. (Also designated by Capitol Chevrolet Company.)

14. Interrogatories by Lawrence Warehouse Company to James A. Kenyon filed November 29, 1952, in No. 30473.

15. Answers by James A. Kenyon to Interrogatories of Lawrence Warehouse Company filed on March 5, 1952, in No. 30473.

16. Interrogatories by Lawrence Warehouse Company to Capitol Chevrolet Company filed on November 29, 1952, in No. 30473.

17. Answers by Capitol Chevrolet Company to Interrogatories of Lawrence Warehouse Company filed January 9, 1952, in No. 30473.

18. Interrogatories by Lawrence Warehouse Com-

pany to Capitol Chevrolet Co. filed November 29, 1952, in No. 30473.

19. Answers by Capitol Chevrolet Co. to Interrogatories of Lawrence Warehouse Company filed January 9, 1952, in No. 30473.

20. Deposition of F. Norman Phelps in No. 30473.

21. Deposition of Alice Phelps in No. 30473.

22. Order for Judgment filed September 12, 1952, in No. 30473. (Also designated by Capitol Chevrolet Company.)

23. Order Amending Order for Judgment filed January 15, 1953, in No. 30473. (Also designated by Capitol Chevrolet Company).

24. Findings of Fact and Conclusions of Law filed February 11, 1953, in No. 30473. (Also designated by Capitol Chevrolet Company.)

25. Judgment entered February 12, 1953, in No. 30473. (Also designated by Capitol Chevrolet Company.)

26. Order Pursuant to Rule 54(b) filed March 3, 1953, in No. 30473.

27. Notice of Appeal by James A. Kenyon, Adams Service Co., F. Norman Phelps and Alice Phelps filed March 10, 1953, in No. 30473.

28. Designation of Record on Appeal by Appellants filed March 12, 1953, in No. 30473.

29. Order Re Motion to Strike Designations in Record on Appeal filed April 15, 1953.

30. Statement of Points on which Appellants James A. Kenyon, Adams Service Co., F. Norman Phelps and Alice Phelps will rely on Appeal.

31. This Designation of Portions of Record to be printed.

Dated: San Francisco, May 25, 1953.

/s/ HERBERT W. CLARK,
/s/ RICHARD J. ARCHER,
/s/ MORRISON, HOHFELD, FOERSTER, SHUMAN & CLARK,
/s/ JAMES B. ISAACS,
/s/ DEMPSEY, THAYER, DEIBERT & KUMLER,

Attorneys for Appellants James A. Kenyon, Adams Service Co., F. Norman Phelps and Alice Phelps

[Endorsed]: Filed May 25, 1953. Paul P. O'Brien, Clerk.

[Title of U. S. Court of Appeals and Cause.]

STATEMENT OF POINTS ON WHICH CAPITOL CHEVROLET COMPANY WILL RELY

1. The Court erred in admitting as evidence and considering as evidence at the trial of the cross-claims of Lawrence Warehouse Company the transcript of evidence (including the transcript of testimony and exhibits) adduced at the trial of the complaint of Defense Supplies Corporation (See Findings, first paragraph, Nos. XV, XVI).

(a) Said evidence was the only evidence offered to show that Capitol Chevrolet Company breached any duty to Lawrence Warehouse Company, incurred any obligation to Lawrence Warehouse Com-

pany, or caused any damage or loss to Lawrence Warehouse Company with regard to the storage of tires and tubes belonging to Defense Supplies Corporation.

2. The Judgment and Findings of Fact (Findings, Nos. V, VI and VII) and Conclusions of Law (Conclusions, Nos. I and II) are unsupported by the evidence because the evidence offered and considered was insufficient to show that Capitol Chevrolet Company breached any duty to Lawrence Warehouse Company, incurred any obligation to Lawrence Warehouse Company, or caused any damage or loss to Lawrence Warehouse Company arising from the storage of tires and tubes belonging to Defense Supplies Corporation.

3. The Court erred in failing to find that Lawrence Warehouse Company was equally, jointly and contributorily negligent or negligent in any of said ways with Capitol Chevrolet Company or was solely negligent in causing the damage for which judgment was rendered in favor of Defense Supplies Corporation in Civil Action No. 23171, if said Capitol Chevrolet Company were negligent at all or if any negligence of said Capitol Chevrolet Company caused or contributed to the cause of said damage and in finding to the contrary (Findings, Nos. VI, VII, XIII, XVII, XVIII, XIX, XXII, XXIII) because:

(a) Lawrence Warehouse Company expressly directed Capitol Chevrolet Company to store tires and tubes of Defense Supplies Corporation in the "Ice Palace" knowing of its fire hazards;

(b) Lawrence Warehouse Company undertook to provide and did provide watchmen for the "Ice Palace" whose duty it was to protect tires and tubes of Defense Supplies Corporation from damage by fire and who had actual knowledge of the acts of V. J. McGrew which caused the damage to said tires and tubes;

(c) Lawrence Warehouse Company, having participated in the trial of the complaint of Defense Supplies Corporation in No. 23171, is bound by the determinations therein that its acts joined and concurred in causing the damage to the tires and tubes of Defense Supplies Corporation (See Findings, No. XVI).

4. The Court erred in finding (Findings, No. XX) as not true that Capitol Chevrolet Company had no dominion or control over the lessors of said "Ice Palace" or over said V. J. McGrew or Charles Elmore.

5. The Court erred in finding (Findings, No. X) that on November 21, 1951, Reconstruction Finance Corporation recovered judgment against cross-claimant Lawrence Warehouse Company and cross-defendant Capitol Chevrolet Company in the amount of $42,171.70 plus interest at the rate of 7 per cent per annum from April 15, 1946, to and including November 21, 1951, and costs in the amount of $20.00, and in finding (Findings, No. XI) that on or about December 1, 1951, while said judgment was still in force and unsatisfied, cross-claimant Lawrence Warehouse Company, paid plaintiff Reconstruction Finance Corporation the sum of $58,859.90

in full satisfaction and discharge of said judgment in favor of said plaintiff because:

(a) Said judgment was not, and is not now, final but is subject to revision at any time, inasmuch as all the claims in Action No. 30473 have not been disposed of;

(b) No evidence was offered or admitted to show that the judgment in Civil Action No. 30473 in favor of Reconstruction Finance Corporation was based on the judgment in Civil Action No. 23171, or that said judgment in Civil Action No. 30473 was paid by Lawrence Warehouse Company.

6. For the foregoing reasons the Court erred in granting judgment in favor of Lawrence Warehouse Company and in refusing to grant judgment in favor of Capitol Chevrolet Company (Conclusions, Nos. I, II).

Dated: San Francisco, May 25, 1953.

/s/ HERBERT W. CLARK,
/s/ RICHARD J. ARCHER,
/s/ MORRISON, HOHFELD, FOERSTER, SHUMAN & CLARK,
/s/ JAMES B. ISAACS,
/s/ DEMPSEY, THAYER, DEIBERT & KUMLER,
Attorneys for Appellant, Capitol Chevrolet Company

[Endorsed]: Filed May 25, 1953. Paul P. OBrien, Clerk.

[Title of U. S. Court of Appeals and Cause.]

DESIGNATION BY CAPITOL CHEVROLET COMPANY OF PORTIONS OF RECORD

1. The following Docket Entries in No. 23171: Nos. 1, 4, 7, 8, 9, 14, 17, 18, 20, 21, 22, 23, 24, entry dated February 20, 1946, 43, 49, 60, 62, 65, 67, 68, 78, 82, entry dated November 21, 1952, 83, 84 and 88.

2. Complaint of Defense Supplies Corporation in No. 23171 filed February 16, 1944.

3. Answer to Complaint and Cross-Complaint of Capitol Chevrolet Company filed April 14, 1944, in No. 23171.

4. Answer to Complaint and Cross-Claim of Lawrence Warehouse Company filed May 17, 1944, in No. 23171.

5. Notice of Time and Place of Trial filed November 24, 1944, in No. 23171.

6. The following portions of the Transcript of Trial and Exhibits dated February 13-15, 1945, in No. 23171:

(a) Appearances, page 2;

(b) Statement of Mr. Wallace, page 9, line 2, to and including page 10, line 7;

(c) Testimony of Clyde W. Henry, page 60, line 6, to and including page 85, line 14;

(d) Testimony of Gordon Kenyon, page 85, line 20, to and including page 99, line 20;

(e) Testimony of James A. Kenyon, page 99, line 22, to and including page 101, line 3;

(f) Testimony of William C. Hanley.

Direct examination by Mr. Lombardi, page 104, line 8, to and including page 105, line 13;

(g) Testimony of V. J. McGrew.

Direct examination by Mr. Lombardi, page 105, line 16, to and including page 110, line 22;

Cross-examination by Mr. Gommo, page 139, lines 12-17;

Cross-examination by Mr. Getz, page 149, line 1, to and including page 152, line 5;

Cross-examination by Mr. Hughes, page 157, line 19, to and including page 162, line 16;

(h) Testimony of W. R. Kissell.

Examination by Mr. Miller, page 173, line 11, to and including page 177, line 18;

Cross-examination by Mr. Getz (including statements of counsel), page 177, line 21, to and including page 185, line 25;

Examination by Mr. Miller, page 186, line 3, to and including line 9.

Examination by Mr. Getz, page 190, line 22, to and including page 191, line 1;

Statements of Counsel, page 200, line 4, to and including page 202, line 19;

(i) Exhibits Nos. 1, 6, 8, 9, 10, 11, 13, A.

7. Opinion of Court filed January 9, 1946, in No. 23171.

8. Findings of Fact and Conclusions of Law filed April 15, 1946, in No. 23171.

9. Judgment filed April 15, 1946, in No. 23171.

10. Substitution of Counsel filed March 7, 1951, in No. 23171.

11. First Amended Answer of Capitol Chevrolet Company to Cross-Claim of Lawrence Warehouse Company filed March 3, 1952, in No. 23171.

12. Order consolidating No. 23171 with No. 30473 for trial filed March 3, 1952.

13. Reporter's Transcript of Proceedings on March 5, 1952, including Exhibit F.

14. Notice of Motion by Capitol Chevrolet Company to Strike Evidence filed April 11, 1952, in No. 23171.

15. Order for Judgment filed September 12, 1952, in No. 23171.

16. Order Amending Order for Judgment filed January 15, 1953, in No. 23171.

17. Findings of Fact and Conclusions of Law filed February 11, 1953, in No. 23171.

18. Judgment entered February 11, 1953, in No. 23171.

19. Notice of Appeal filed March 10, 1953, in No. 23171.

20. Designation of Record on Appeal by Appellant filed March 12, 1953, in No. 23171.

21. Statement of Points on which Capitol Chevrolet Company Intends to Rely on Appeal.

22. This Designation of Portions of Record to be printed.

Dated: San Francisco, May 25, 1953.

/s/ HERBERT W. CLARK,
/s/ RICHARD J. ARCHER,
/s/ MORRISON, HOHFELD, FOERSTER, SHUMAN & CLARK,
/s/ JAMES B. ISAACS,
/s/ DEMPSEY, THAYER, DEIBERT & KUMLER,
Attorneys for Appellant, Capitol Chevrolet Company

[Endorsed]: Filed May 25, 1953. Paul P. O'Brien, Clerk.

[Title of U. S. Court of Appeals and Cause.]

DESIGNATION BY LAWRENCE WAREHOUSE COMPANY OF PORTIONS OF RECORD

Items filed and numbered in Action No. 23171-G alone:

1. Reporter's Transcript and all exhibits and evidence admitted and filed; excepting Exhibits 4, 5, 14, A and B.

2. Mandate of The Court of Appeals.

3. Page 23, lines 5 to 10, of Reply Brief dated April 11, 1952, filed on behalf of all cross-defendants, wherein it is stated:

"If liability on the part of Capitol Chevrolet Company exists, it is true that this liability was expressly assumed by James A. Kenyon and Adams Service Co., and their successors and privies except Capitol Service Co., and the new corporation. It is not contended that F. Norman Phelps and Alice Phelps are not liable if Adams Service Co. is liable."

4. Page 1 of Reply Brief dated April 11, 1952, filed on behalf of all cross-defendants, wherein it is stated:

"Answering Memorandum of Cross Defendants Capitol Chevrolet Company, James A. Kenyon, Capitol Chevrolet Co., Adams Service Co., J. A. K. Co., F. Norman Phelps and Alice Phelps."

Items filed and numbered in Action No. 30473 alone:

1. Answer of defendant Capitol Chevrolet Co.;

2. Return of Summons to Alice and F. Norman Phelps;

3. Answer of Cross-Defendant Capitol Chevrolet Co. to Cross-Claim of Lawrence Warehouse Company;

4. Answer of Cross-Defendant Capitol Chevrolet Company to Cross-Claim of Lawrence Warehouse Company;

5. Answer of Cross-Defendant James A. Kenyon to Cross-Claim of Lawrence Warehouse Company;

6. Assignment of Judgment, dated November 29, 1951;

7. Notice of Payment of Judgment and Claim to

Contribution or Repayment, dated December 6, 1951;

8. Notice of Time and Place of Taking Deposition of Alice Phelps;

9. Amendments by James A. Kenyon and Adams Service Co. to Findings of Fact and Conclusions of Law as Proposed by Lawrence Warehouse Company;

10. Transcript of hearing on January 8 and 9, 1952.

Items filed and numbered in both Actions Nos. 23171-G and 30473:

1. Notice of Motion and Motion of Cross-Claimant Lawrence Warehouse Company for an Order Vacating the Submission of the Above-entitled Cause and to Reopen the Same for Further Hearing and Evidence on the Question of the Liability of Certain Defendants;

2. Notice of Motion and Motion for an Order Modifying Opinion and Order for Judgment;

3. Memorandum of Court upon Signing of Judgment, dated February 11, 1953;

4. Stipulation and Order Extending Time to File Opening Brief of Lawrence Warehouse Company until March 25, 1952;

5. All exhibits and evidence not designated by Appellant admitted in trial of cross-claims 23171-G and 30473;

6. Stipulation and Order dated April 24, 1952;

7. Designation by Cross-Claimant and Appellee, Lawrence Warehouse Company, of Portions of Rec-

ord, Proceedings and Evidence to be Contained in Record on Appeal;

8. Notice of Motion to Strike or Consolidate the Designations of Cross-Defendants and Their Notices of Appeal, filed March 26, 1953;

9. Supplemental Designation by Cross-Claimant and Appellee, Lawrence Warehouse Company, of Record on Appeal, filed April 17, 1953;

10. This Designation by Lawrence Warehouse Company of Portions of Record to be Printed.

Dated: June 4, 1953.

/s/ W. R. WALLACE, JR.,
/s/ MAYNARD GARRISON,
/s/ JOHN R. PASCOE,
/s/ WALLACE, GARRISON, NORTON & RAY,
Attorneys for Appellee

Acknowledgment of Service attached.

[Endorsed]: Filed June 4, 1953. Paul P. O'Brien, Clerk.

[Title of U. S. Court of Appeals and Cause.]

STIPULATION THAT PRINTED TRANSCRIP OF RECORD IN CAUSE NO. 11418 MAY BE CONSIDERED TO BE PART OF THE RECORD

It Is Hereby Stipulated by and between the parties hereto, through their respective counsel, that upon the appeal of the above-entitled cause the court may consider, as being and constituting a portion of the record on appeal, the printed tran-

script of record on appeal in Cause No. 11418 on file in the above-entitled court.

The parties respectfully show that the following items designated by the parties to this appeal have heretofore been printed in the printed transcript of record in Cause No. 11418:

Items designated by appellant Capitol Chevrolet Company:

1. Complaint of Defense Supplies Corporation filed in Civil Action No. 23171.

2. Answer to Complaint and Cross-Complaint of Capitol Chevrolet Company filed in Civil Action No. 23171.

3. Answer to Complaint and Cross-Claim of Lawrence Warehouse Company filed in Civil Action No. 23171.

4. Portions of Transcript of Trial on February 13-14, 1945, filed in Civil Action No. 23171.

5. Exhibits Nos. 1, 6, 8, 9, 10, 11, 13 filed in Civil Action No. 23171.

6. Opinion of the Court filed January 9, 1946, in Civil Action No. 23171.

7. Findings of Fact and Conclusions of Law filed April 15, 1946, in Civil Action No. 23171.

8. Judgment filed April 15, 1946, in Civil Action No. 23171.

Items designated by Lawrence Warehouse Company:

1. Reporter's Transcript and all exhibits and evidence admitted and filed in the trial on February 13-15, 1945, in Civil Action No. 23171, except Exhibits Nos. 4, 5 and A.

The parties hereto further respectfully show that Exhibits A, B, C, D and E in the consolidated trial of the cross-claims in Civil Actions Nos. 23171 and 30473 designated by Lawrence Warehouse Company are printed in said transcript of record on appeal in Cause No. 11418.

Dated: San Francisco, June 8, 1953.

/s/ HERBERT W. CLARK,
/s/ RICHARD J. ARCHER,
/s/ MORRISON, HOHFELD, FOERSTER, SHUMAN & CLARK,
/s/ JAMES B. ISAACS,
/s/ DEMPSEY, THAYER, DEIBERT & KUMLER,
Attorneys for Appellants
/s/ W. R. WALLACE, JR.,
/s/ MAYNARD GARRISON,
/s/ JOHN R. PASCOE,
/s/ WALLACE, GARRISON, NORTON & RAY,
Attorneys for Appellee, Lawrance Warehouse Company

It is so ordered this 9th day of June, 1953.

/s/ WILLIAM DENMAN,
/s/ WILLIAM HEALY,
/s/ HOMER T. BONE,
Judges of the United States Court of Appeals

[Endorsed]: Filed June 11, 1953. Paul P. O'Brien, Clerk.

[Title of U. S. Court of Appeals and Cause.]

SUPPLEMENTAL DESIGNATION BY LAWRENCE WAREHOUSE COMPANY OF PORTIONS OF RECORD

Amending Item No. 1 under "Items Filed and Numbered in Action No. 23171-G Alone" of Designation by Lawrence Warehouse Company of Portions of Record to be Printed to read:

"1. Reporter's Transcript and all exhibits and evidence admitted and filed, excepting Exhibits 4, 5, 14, A and B."

Dated: June 10, 1953.

/s/ W. R. WALLACE, JR.,
/s/ MAYNARD GARRISON,
/s/ JOHN R. PASCOE,
/s/ WALLACE, GARRISON, NORTON & RAY,
Attorneys for Appellee

Acknowledgment of Service attached.

[Endorsed]: Filed June 11, 1953. Paul P. O'Brien, Clerk.

[Title of U. S. Court of Appeals and Cause.]

SUPPLEMENTAL DESIGNATION BY CAPITOL CHEVROLET COMPANY OF PORTIONS OF RECORD

Comes now appellant Capitol Chevrolet Company and designates for printing the stipulation and order filed June 11, 1953, that the printed transcript of the record in Cause No. 11418 be considered to be part of the record on appeal in the above-entitled action.

Dated: San Francisco, June 19, 1953.

/s/ HERBERT W. CLARK,
/s/ RICHARD J. ARCHER,
/s/ MORRISON, HOHFELD, FOERSTER, SHUMAN & CLARK,
/s/ JAMES B. ISAACS,
/s/ DEMPSEY, THAYER, DEIBERT & KUMLER,
Attorneys for Appellant, Capitol Chevrolet Company

Acknowledgment of Service attached.

[Endorsed]: Filed June 19, 1953. Paul P. O'Brien, Clerk.